Supreme Court, U.S.
FILED

NO. (1)

981504 JAN 27 1999

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM 1998

ROBERT L. COMEAUX

Plaintiff-Appellant

V.

UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC; RAY B. WOOSTER

Defendants-Appellees

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI VOLUME I

THAD HARKINS
HARKINS, LATIMER & DAHL, P.C.
405 N. St. Mary's Street, Suite 242
San Antonio, Texas 78205
(210) 527-0900 (Telephone)
(210) 527-0901 (Facsimile)

COUNSEL OF RECORD FOR APPELLANT/PETITIONER

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

7 pp

STATEMENT OF THE ISSUES ASSERTED FOR CONSIDERATION

(A) Whether under *Finnegan v. Leu,* an appointed union official can assert rights under §101(a)(1) and (2) of the LMRDA for infringement of protected rights, including freedom of assembly, freedom of speech and right to participate in elections; and

(B) Under what circumstances does §101(a)(1) and (2) of the LMRDA afford appointed officials a claim for relief if employment is terminated as "part of a purposeful and deliberate attempt to suppress dissent within the union."

(C) Whether the trial court erred in granting summary judgment against plaintiff, given its erroneous finding that plaintiff did not assert a violation of his free speech rights, and there being no finding, or alternatively an erroneous finding, on the issue of whether plaintiff's claims bring him within the "purposeful and deliberate attempt to suppress dissent within the union exception to the broad holding in *Finnegan v. Leu.*"

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Plaintiff-Appellant certifies that the following listed persons and entities have a financial interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Plaintiff-Appellant: Robert L. Comeaux is an individual residing in San Antonio, Texas. The attorney of record is Thad Harkins of the law firm of Harkins, Latimer & Dahl, P.C. in San Antono, Texas.

Defendants-Appellees: United Food and Commercial Workers Local Union No. 455 is a local labor organization, organized and existing as a local of the United Food and Commercial Workers International Union, AFL-CIO, CLC. Ray B. Wooster is an individual residing in Willis, Texas. Local 455 and Ray B. Wooster are represented by Patrick M. Flynn of Houston, Texas, and the International Union is represented by Eric H. Nelson of Houston, Texas.

/s/ Thad Harkins

THAD HARKINS

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STATEMENT OF THE JURISDICTIONAL BASIS FOR THE COURT'S REVIEW OF THIS CASE

Suit was filed by Plaintiff on September 15, 1994, in the United States District Court, Western District of Texas, Civil Action No. SA-94-CV-771, alleging violation of 29 U.S.C. §411(a)(1) and (2), the Americans with Disabilities Act and 42 U.S.C. §1985(3). Jurisdiction of the federal district court in this case is conferred by 28 U.S.C. §1331. After initial discovery including the depositions of the individual parties, Defendants filed their respective partial summary judgment motions. The trial Court, after reviewing the briefs of the parties, entered its order granting summary judgment of all remaining claims on September 30, 1997. The Plaintiff filed his motion for new trial, and notice of appeal was filed on December 29, 1997. By panel decision dated October 2, 1998, Garwood, Jolly and Barksdale, Circuit Judges, a per curiam opinion affirming the trial court's ruling was entered. Rehearing was denied by order dated October 29, 1998. Accordingly, jurisdiction of this Court is conferred under 28 U.S.C. §1254(1).

STATUTES AT ISSUE

29 U.S.C. §411. Bill of rights; constitution and by laws of labor organizations.

(a)(1) Equal rights

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organizations' constitution and bylaws.

(2) Freedom of speech and assembly

Every member of any labor organization shall have the right to meet and assemble freely with other members, and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) Dues, initiation fees, and assessments

Except in the cases of a federation of national or inter-

STATUTES AT ISSUE (continued)

national labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except -

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in s membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: provided, that such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

STATUTES AT ISSUE (continued)

(4) Protection of the right to sue

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: provided, that any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: and provided further, that no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Invalidity of constitution and bylaws

Any provision of the constitution and bylaws of any

labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

29 U.S.C. §412. Civil Action for infringement of rights; jurisdiction

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

29 U.S.C. §413. Retention of existing rights of members

Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

29 U.S.C. §414. Right to copies of collective bargaining agreements

It shall be the duty of the secretary or corresponding principal officer of each labor organization, in the case of a local labor organization, to forward a copy of each collective bargaining agreement made by such labor organization with any employer to any employee who requests such a copy and

whose rights as such employee are directly affected by such agreement, and in the case of a labor organization other than a local labor organization, to forward a copy of any such agreement to each constituent unit which has members directly affected by such agreement; and such officer shall maintain at the principal office of the labor organization of which he is an officer copies of any such agreement made or received by such labor organization, which copies shall be available for inspection by any member or by any employee whose rights are affected by such agreement. The provisions of section 440 of this title shall be applicable in the enforcement of this section.

29 U.S.C. §415. Information to members of provisions of chapter

Every labor organization shall inform its members concerning the provisions of this chapter.

STATEMENT OF FACTS NECESSARY TO THE ARGUMENT OF THE ISSUES

Plaintiff was an employee of the United Food and Commercial Workers Union and its predecessor in interest from 1971 until his termination from employment on September 16, 1992, other than brief employment with the AFL-CIO, of which the UFCW was the largest affiliate. Plaintiff, as discussed in the argument and authorities, was an appointed official of the Local, and had previously raised concerns and expressed his desire to seek election against the successor and heir apparent to the Local President, Ray Wooster. Plaintiff originally raised claims of conspiracy under §1985(3) and the Americans with Disabilities Act. Plaintiff has not appealed and does not assert these claims in this petition, except to the extent that the granting of certiorari may occasion a review on remand of the claims under §1985(3).

ARGUMENT AND AUTHORITIES

Robert L. Comeaux, Plaintiff and Appellant files this Petition for Writ of Certiorari, showing that the trial court's opinion and the Fifth Circuit's order of affirmance, filed October 2, 1998, are erroneous; and that upon granting of this writ, this cause should be reversed and remanded.

Background

1. The trial court held that Plaintiff's claims of violation of the "Union Members' Bill of Rights," 29 U.S.C.A. §§411-415, are barred under the Supreme Court decision in *Finnegan v. Leu,* 456 U.S. 431, 102 S.Ct. 1867, 72 L.Ed. 2d 239 (1982). The Fifth Circuit's per curiam opinion, attached as an appendix to this motion, provides no reasoning other than affirmance of the trial court's order granting summary judgment (R000561-000576). *Finnegan,* as well as all of its progeny, have recognized that although a new president of a local union has the right to terminate the employment of appointed employees of the local union in order to "choose a staff whose views are compatible with his own", it does not bar a plaintiff's cause of action challenging a union's authority to utilize dismissal from union office as "part of a purposeful and deliberate attempt to...suppress dissent within the union." 456 U.S. at 441, 102 S.Ct. at 1873. *See also Adams-Lundy v Association of Professional Flight Attendants,* 731 F.2d 1154, 1159 (5th Cir. 1984) (acknowledging that in such an attempt, "the firing of even an appointed official would presumably violate the Act").

2. Plaintiff, as pled in his original complaint, asserts this very exception, and neither the district court nor the Fifth Circuit

has addressed the Plaintiff's pleadings and proof which, if taken as true as required, put his claims within such exception. Plaintiff's complaint itself alleges that the action is "part of a deliberate attempt to suppress dissent within the Defendant Local" (R000006) and throughout the record below, in deposition and affidavit testimony. Plaintiff's proffer of such is unrefuted. (*See* Plaintiff's deposition excerpts, attached as No. 8 to Plaintiff's Appeal Brief; Affidavit of Clara Jean Bane (R000313-316), attached as No. 10 to Plaintiff's Appeal Brief).

3. In addition, the claims in this case, taking the allegations contained in the complaint as true for purposes of summary judgment, establish that Plaintiff was actively in opposition to the Local leadership's actions as a *member* of Local 455, and it was known to the Local's leadership that Plaintiff himself was seeking election in an upcoming election in which Defendant Wooster had already announced he would not run. (R000004-5). Thus, the narrow holding in *Finnegan,* that a new president could surround himself with supporters rather than opponents, is not applicable. Even Wooster admitted in his deposition in this case that Plaintiff did not act unloyal to Defendant Wooster, and was not insubordinate to Wooster. (See Response to Partial Motion for Summary Judgment, (R000269) and Wooster deposition excerpts cited therein.) The basis for the termination in this case was Plaintiff's exercise of his right to be involved in the Local election process and his right of free speech and assembly, protected under Sections 101(a)(1) and (2) of the Union Members' Bill of Rights.

4. The trial court below, in conclusory fashion, states that "Plaintiff does not claim that he was denied the right to vote or express his opinions on matters of concern to the

union as a rank and file member." (R at 000572-3). This is not true. What the trial court failed to recognize and acknowledge is that Plaintiff was terminated within days of speaking out *as a member* in August and September, 1992, and for expressing his interest in seeking the presidency in the upcoming election. Months later, but before the election, Defendant Wooster's hand-picked successor, Richard Elliott, which Plaintiff asserts was due to the erroneous belief that Plaintiff's membership had lapsed, threatened to remove him from one of the Local's meetings, and have him arrested. (R000363, R000377, R000382, R000387-388). Nothing in *Finnegan* addresses this issue. As pointed out by Justice White in his concurring opinion in *Sheetmetal Workers International Association v. Lynn,* 488 U.S. 347, 109 S.Ct. 639, 102 L.Ed. 2d 700 (1989):

> the speech for which Respondent was removed was also speech in the capacity of a member.... In this case, unlike *Finnegan,* respondent was not discharged by an incoming elected president with power to appoint his own staff, but by a trustee whose power to dismiss and appoint officers...went no further than the Local's president's to discharge for cause.... Respondent's speech opposing the dues increase was the speech of a member about a matter the members were to resolve, and there is no countervailing interest rooted in union democracy that suffices to override that protection.
>
> Thus, I doubt that resolution of cases like this turns on whether an officer is elected or appointed. Rather its inquiry is whether an officer speaks as a member or as an officer in discharge of his assigned duty. If the former, he is protected by Title I....

Lynn, 488 U.S. at 360, 109 S.Ct. at 647 (White, J., concurring).

Application of *Finnegan/Lynn*

5. In *Lynn*, the Supreme Court majority, in an important footnote, backs away from the harsh reading of *Finnegan* adopted by the trial court in this case. *Lynn*, 488 U.S. at 355, FN 7. The court makes it clear that there are a number of possible circumstances where an appointed local union official might present a cognizable claim under Section 102, and that *Finnegan* is limited to its own facts. Like the successful plaintiff in *Lynn*, Plaintiff was retaliated against for his opposition to the incumbent administration who had hired him and was also deprived of his rights due to his intent to run for election against the hand-picked successor to the incumbent president. Unlike *Finnegan*, plaintiff's termination was not part of any "house cleaning" by a newly elected Local president, but for alleged economic reasons, which Plaintiff would show at trial, upon reversal and remand, to be pretextual in nature.

6. Rather than the distinction between an elected and an appointed official, the only real distinction between Plaintiff's situation and Lynn's was that Lynn had been elected rather than appointed to the same position Plaintiff held (business agent), and that in addition to speaking out against the policies and actions of the incumbent who had appointed and retained him, Plaintiff became a candidate for the local election to be held the following year. Plaintiff, like the Plaintiff in *Lynn*, paid a price for the exercise of his membership rights, and his removal created a harsh chilling effect on his speaking out in the future, or at the very least, relegated him to the role of an outsider and a perceived disgruntled ex-

employee, not the best place from which to build member support in an election, allegedly carried out under a democratic process. Thus, Plaintiff stands in the same shoes, though appointed, as the Plaintiff in *Lynn*, in both his membership rights as well as his right to be visible as a candidate for the upcoming election.

7. In the case at bar, the reason given to Plaintiff for termination was not failure to support new leadership, but was instead that he was being "laid-off" for alleged financial reasons, though Defendant Wooster admitted he had no documentation supporting the layoff. (R000469, 000484). As revealed in the deposition excerpts attached to Plaintiff's appeal brief, Plaintiff has knowledge of a comment by Defendant Wooster that "the Local would not have to worry about him after December of 1992," because his eligibility for membership would have expired. (R000382). Thus, unlike *Finnegan,* there is in this case a triable issue of fact on the intent to injure Plaintiff's membership status itself. Though at least twelve positions became available through international union subsidies within weeks after Plaintiff was laid off for alleged financial reasons, Plaintiff was not rehired when such new positions, for which he was qualified, were filled. (R000495, R000005).

Conflict Between the Circuits

8. One recent case from another Circuit clearly on point establishes that the distinction between elected and appointed union officials does not control where the issue is one of suppression of dissent. *Thompson v. Office and Professional Employees International Union, AFL-CIO,* 74 F.3d 1492 (6th Cir. 1995), *cert. denied,* 117 S.Ct. 482 (1996). In *Thompson,*

the appointed official prevailed on his LMRDA claim, in facts strikingly similar to this case. Thompson, after over twenty years of union work, was *appointed* to a local staff as a business representative (like Plaintiff); shortly before election nominations took place. Thompson acknowledged his interest in running for Local office and raised concerns about the Local's administration (like Plaintiff); shortly after this, the incumbent took steps to injure his eligibility to run through an attack on his membership status (like Plaintiff); after doing so, Thompson was fired (unlike Plaintiff, by a trustee appointed by the International); and ultimately, another reform candidate won (like Plaintiff's case). *Id.*,at 1496-1500.

9. There is evidence in this case, as in *Thompson*, of intent to injure Plaintiff's employment status as a result of his protected activity. What was different is that *Thompson was never even a member of the union,* though he was afforded rights that your Plaintiff, Bob Comeaux, a member of Local 455, has not been afforded in this case. In addition, at least one District Court in the Fifth Circuit has held that where an employee wears two hats, that of rank-and-file member and appointed official, he is protected in his Article I rights. *Kirk v Transportation Workers Union of America,* 934 F.Supp. 775, 787-788 (S.D.Tex. 1995).

10. Other Circuits have taken the position advocated by Plaintiff in this case. For example, in *Schermerhorn v Local 100, Transport Workers Union of America,* 91 F.3d 316 (2nd Cir. 1996) the Court affirmed Judgment for Plaintiffs who were members of a reform caucus (like Plaintiff), where union officers are silenced in a scheme to suppress dissent, and where the jury found the required finding of such a

deliberate scheme under a clear and convincing evidence standard. Like Plaintiff, one of the plaintiffs in *Schermerhorn* was thwarted in his attempt to gain access to a meeting of the local.

11. Similarly, and consistent with *Thompson, Kirk* and *Schermerhorn,* a Colorado District Court found against a UFCW local and its president in a case strikingly similar to Plaintiff's. *Nixon v. United Food and Commercial Workers International Union, Local No. 7*, 751 F.Supp. 1491 (D.C. Col. 1990). In *Nixon,* the plaintiff provided the type of proof, affidavit and deposition, which Plaintiff has offered in this case. Unlike the trial court in this case, the district court there properly reviewed the evidence, and determined that a fact issue existed which required a trial on the merits. This honorable Court is asked to cause the same to be done in this case.

Conclusion

Thus, there appears to be a conflict between the Circuits, and even uncertainty in this Circuit, which deserves clarification by this court. This case presents a unique set of facts, not previously addressed by this court, which lies within the narrow exception created and allowed for an appointed union employee asserting his Article I rights under *Finnegan v Leu*. Moreover, reconsideration and remand in this case is consistent with the reasoning of this Court in *Adams-Lundy*, as Plaintiff has met the threshold burden that case applies to survive attack under the Federal Rules of Civil Procedure. Importantly, reversal and remand for trial on the merits in this case preserves the democratic purposes of the Union Members' Bill of Right — to permit and encourage all members, even officials, to speak out against corrupt and improper acts by union leaders, and to participate in and seek office through democratic elections without fear of retaliation and reprisal.

Respectfully Submitted

HARKINS, LATIMER & DAHL, P.C.
405 N. St. Mary's Street, Suite 242
San Antonio, Texas 78205
(210) 527-0900 (Telephone)
(210) 527-0901 (Facsimile)

By: /s/ Thad Harkins

THAD HARKINS
State Bar No. 09009700

COUNSEL OF RECORD FOR APPELLANT/PETITIONER

APPENDIX 1

98-50013

GENERAL DOCKET FOR
FIFTH CIRCUIT COURT OF APPEALS

Court of Appeals Docket #: 98-50013 Filed: 1/6/98
Nsuit: 3730 Labor: Reporting/Disclosure
Comeaux v. Local Union 455, et al
Appeal from: Western District of Texas, San Antonio

- -

Lower court information:

District: 0542-5 : SA-94-CV-771
Ordering Judge: Samuel Fred Biery, Jr. US District Judge
Date Filed: 9/15/94
Date order/judgment: 10/1/97
Date NOA filed: 12/29/97

- -

Fee status: Paid

- -

Prior cases:
None
Current cases:
None

Docket as of January 27, 1999 8.56 am Page 1

Proceedings include all events.
98-50013 Comeaux v. Local Union 455, et al

ROBERT L COMEAUX Plaintiff - Appellant	Thad Harkins FTS 527-0901 210-527-0900 [COR LD NTC ret] Harkins, Latimer & Dahl 405 N St Mary's Street San Antonio, TX 78205
v.	
UNITED FOOD AND COM- MERCIAL WORKERS LOCAL UNION NO 455 Defendant - Appellee	Patrick M Flynn FTS 861-2568 713-861-6163 [COR LD NTC ret] 1235 N Loop West Suite 1235 Houston, TX 77008
UNITED FOOD AND COM- MERCIAL WORKERS IN- TERNATIONAL UNION, AFL-CIO, CLC Defendant - Appellee	Eric H Nelson FTS 524-4421 (713) 526-1998 [COR LD NTC ret] 3303 Main Street Suite 300 Houston, TX 77002
RAY B WOOSTER Defendant - Appellee	Patrick M Flynn (see above) [COR LD NTC ret]

Proceedings include all events.
98-50013 Comeaux v. Local Union 455, et al

ROBERT L COMEAUX

Plaintiff - Appellant

v.

UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC; RAY B WOOSTER

Defendants - Appellees

Proceedings include all events.
98-50013 Comeaux v. Local Union 455, et al

1/6/98	Private civil federal case docketed. NOA filed by Appellant Robert L. Comeaux. [98-50013]
1/26/98	Appearance form filed by Eric H Nelson for Appellee United Food Cmercl. [98-50013]
1/28/98	Appearance form filed by Patrick M Flynn for Appellee Ray B Wooster, Appellee United Food Cmercl. [98!50013]
1/30/98	Record on appeal filed. Pleadings: 3 vols. [98-50013] ROA ddl satisfied.

2/11/98 Briefing notice issued. [98-50013] A/Pet's Brief due on 3/23/98 for Robert L Comeaux.

3/10/98 Extension granted by phone until: 4/22/98 to file brief for Appellant Robert L Comeaux. [98-50013]

3/16/98 Confirmation letter filed by Appellant Robert L Comeaux confirming an extension of time to and including 4/22/98 for filing brief. [98-50013] A/Pet's Brief ddl updated to 4/22/98 for Robert L Comeaux.

3/16/98 Appearance form filed by Thad Harkins for Appellant Robert L Comeaux. [98-50013]

3/31/98 Record on appeal released to attorney Thad Harkins for Appellant Robert L Comeaux. Volumes: 3. [98-50013]

4/22/98 Unopposed motion filed by Appellant Robert L Comeaux to extend time to file appellant(s) brief until 5/5/98 [917820-1] [98-50013]

4/24/98 CLERK Order filed granting appellant's unopposed motion to extend time to file Appellant's Brief until 5/5/98 [917820-1] A/Pet's Brief ddl updated to 5/5/98 for Robert L Comeaux. Copies to all counsel. [98-50013]

5/7/98 Appellant's Brief filed by Appellant Robert L Comeaux. Copies of brief: 7 # of pages: 12. Date of COS: 5/5/98 Sufficient [Y/N] : N, proportional type too small. [98-50013] A/Pet's Brief ddl satisfied. E/Res's Brief due on 6/8/98 for Ray

B Wooster, for United Food Cmercl, for United Food Cmercl. Sufficient Brief due on 5/21/98 for Robert L Comeaux.

5/7/98 Record excerpts filed by Appellant Robert L Comeaux # of copies: 4 Sufficient [Y/N] : N, dkt entry dates deleted, excess pages & needs COS. [98-50013] Sufficient Record Excerpts due on 5/21/98 for Robert L Comeaux

5/22/98 Brief made sufficient by Appellant Robert L Comeaux [98-50013] Sufficient Brief ddl satisfied.

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Proceedings include all events.
98-50013 Comeaux v. Local Union 455, et al

5/22/98 Record Excerpts made sufficient by Appellant Robert L Comeaux [98-50013] Sufficient Record Excerpts ddl satisfied.

6/5/98 Record on appeal returned to 5CCA. Volumes: 3 [98-50013]

6/5/98 Appellee's Brief filed by Appellee United Food Cmercl, Appellee United Food Cmercl, Appellee Ray B Wooster. Copies of Brief: 7 # of pages: 24. Date of COS: 6/3/98 Sufficient [Y/N] : Y. [98-50013] E/Res's Brief ddl satisfied. Reply Brief due on 6/19/98 for Robert L Comeaux.

6/9/98 Unopposed Motion filed by Appellee United Food Cmercl, Appellee United Food Cmercl,

Appellee Ray B Wooster to file corrected brief [961294-1]. [98-50013]

6/9/98 CLERK Order filed granting appellees, United Food and Commercial Workers Local Union, United Food and Commercial Workers International and Ray B. Wooster's unopposed motion to file corrected brief [961294-1] Copies to all counsel. [98-50013]

6/9/98 We are withdrawing appellee brief(s) [960065-1] filed by Appellee United Food Cmercl, Appellee United Food Cmercl, Appellee Ray B Wooster. [98-50013]

6/9/98 Appellee's Corrected Brief filed by Appellee United Food Cmercl, Appellee United Food Cmercl, Appellee Ray B Wooster Copies of Brief: 7 # of pages: 25. Date of COS: 6/8/98 Sufficient [Y/N]: y. [98-50013]

6/26/98 Briefing Complete. [98-50013] Reply brief ddl canceled.

10/2/98 Opinion filed. Issue Mandate due on 10/23/98. [98-50013]

10/2/98 Judgment entered and filed. [98-50013]

10/16/98 Petition filed by Appellant Robert L Comeaux for rehearing. # of copies filed: 4 [1086967-1] Issue Mandate ddl canceled. [98-50013]

10/29/98 COURT Order filed denying petition for rehearing

[1086967-1] Issue Mandate due on 11/5/98. Copies to all counsel. [98-50013]

11/6/98 Mandate issued. Approved BOC Issued (Y/N)?: n [98-50013] Issue Mandate ddl satisfied.

11/6/98 Record on appeal returned to USDC. Volumes: 3. [98-50013]

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APPENDIX 2

900561

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SEP 30 1997

ROBERT L. COMEAUX	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. SA-94-CA-0771
UNITED FOOD AND	§	
COMMERCIAL WORK-	§	
ERS LOCAL UNION	§	
NO. 455, UNITED FOOD	§	
AND COMMERCIAL	§	
WORKERS INTER-	§	
NATIONAL AFL-CIO,	§	
CLC; and RAY B.	§	
WOOSTER,	§	
	§	
Defendants.	§	

ORDER CONCERNING PENDING MOTIONS FOR SUMMARY JUDGMENT

Pending before the Court are the following motions: (1) Defendants United Food and Commercial Workers Local Union 455 and Ray B. Wooster's Motion for Partial Summary

Judgment (docket #33); (2) Defendants United Food and Commercial Workers Local Union 455 and Ray B. Wooster's Motion for Partial Dismissal (docker #35); and (3) Motion for Summary Judgment of Defendant United Food and Commercial Workers International Union (docket #37). Although the Court is empathetic with life's vicissitudes confronted by plaintiff, it is the Court's opinion, based on the law and the record herein, that defendants' motions be granted.

I. FACTS

In the complaint, plaintiff claims he was terminated from his employment as a business agent for defendant United Food and Commercial Workers Local Union 455 (Local) in retaliation for seeking the office of local president and also substantially in response to a reasonable work restriction which had been placed on him as a recovering "workaholic" (work restriction of no more than 45 hours a week). Defendant Wooster was the former president of the defendant Local and simultaneously a vice president of defendant United Food and Commercial Workers International Union (International). Defendant Wooster had general supervisory authority over all the affairs of the defendant Local and controlled the employment decisions at issue in this case.

In August and September of 1992, plaintiff was employed by defendant Local as a business representative with his union office located in San Antonio. During this time, plaintiff learned that Mr. Wooster intended to step down as president of the Local and had hand-picked a succcessor. Based on that information, plaintiff took overt actions in support of his own candidacy for president of the Local on or about August 30, 1992. On September 12, 1992, defendant

Local's staff members were advised that current professional staffing would continue for several months and any potential layoffs were several months away. On or about September 16, 1992, plaintiff received a letter advising him he was selected to be laid off on or about October 3, 1992.

After the effective date of plaintiff's alleged layoff, defendant international actually increased its subsidy to defendant Local and additional staff members were hired using those funds. Plaintiff was not recalled to work. Defendant Wooster told plaintiff he would be happy to help him get a job in another union or give him a letter of recommendation but only if plaintiff would immediately accept reemployment elsewhere and thereby become ineligible to continue to run for the president of the defendant Local.

Plaintiff claims the defendants unlawfully terminated him from employment and then failed to recall him largely because of his exercise of protected free speech rights, including campaigning for the office of president of defendant Local, all in violation of plaintiff's rights under 29 U.S.C. § 411 (a) (1) and (2). Plaintiff also alleges defendant Wooster conspired with other employees and agents of the defendant Local and defendant International to injure plaintiff's employment relationship. The acts committed in furtherance of the conspiracy included terminating plaintiff in a false layoff and then failing to recall him to available work. This conduct violated plaintiff's rights under 43 U.S.C. § 1985 (2).

Also included in plaintiff's complaint is a claim under the Americans with Disabilities Act. Plaintiff claims the defendants terminated his employment and then failed to recall him because of his restriction of working no more than

45 hours per week. This claim was dismissed with prejudice as to defendant United Food and Commercial Workers International Union AFL-CIO, CLC on January 24, 1997 (docket #40).

II. SUMMARY JUDGMENT STANDARD

Summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56 (c). An issue is considered "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party, and a fact is considered "material" if its resolution in favor of one party might affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)

The moving party is "entitled to judgment as a matter of law if the nonmoving party fails to make a sufficient showing of an essential element of the case to which the nonmoving party has the burden of proof." *Melton v. Teachers Ins. & Annuity Ass'n*, 114 F.3d 557, 559 (5th Cir. 1997). The evidence is viewed in the light move favorable to the nonmovant but the nonmovant must "set forth specific facts to establish that there is a genuine issue for trial, but where the evidential submissions lack probative value as to a genuine issue, summary judgment is appropriate." *Id.* "A summary assertion made in an affidavit is simply not enough evidence to raise a genuine issue of material fact." *Id.* Nor may a summary judgment motion be defeated by "unsupported allegations or affidavit or deposition testimony set-

ting forth ultimate or conclusory facts and conclusions of law." *Clark v. America's Favorite Chicken Co.*, 110 F.3d 295, 297 (5th Cir. 1997).

III. CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT

In the motion for partial summary judgment, defendants Local and Ray B. Wooster contend that plaintiff cannot establish a claim under the Americans with Disabilities Act (ADA) because (1) defendants had no knowledge of any "disability" of plaintiff at the time of his termination and (2) plaintiff had no "disability for ADA purposes. Defendants also claim that defendant Wooster cannot be individually liable under the ADA. In response to the motion, plaintiff claims (1) the motion is premature because discovery has not been completed; (2) defendants have misstated the legal basis for an ADA claim in their motion; (3) defendants' claim of no knowledge of plaintiff's disability is disputed; (4) defendants have misstated the law applicable to chronic psychological impairments, and (5) defendants' claim that plaintiff was not disabled within the context of his workplace is also disputed.

A. Motion for Summary Judgment Premature

Plaintiff contends defendants' motions are premature because discovery has not been completed. Although that was a true statement at the time the responses to defendants' motions were filed, this Court has held off ruling on the motions until after both the discovery deadline and dispositive motions deadline have run.[1] Therefore, the Court finds that

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[1] On January 2, 1997, a Rule 16 conference was held. After this conference,

a ruling on the motions is no longer premature.

B. Legal Basis for an ADA Claim

Plaintiff argues defendants have misstated the basic elements of an ADA claim by stating the three-part definition of disability in the conjunctive instead of the disjunctive. Defendants have remedied any misinterpretation of the elements in their reply to plaintiff's response.

Under the ADA, discrimination is prohibited "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Dutcher v. Ingalls Shipbuilding,* 53 F.3d 723, 725 (5th Cir. 1995) (quoting 42 U.S.C. § 12112 (a)). As used in the ADA, "disability" means:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; *or*

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footnote 1 continued

the Court issued an order extending the discovery deadline until March 31, 1997 (*see* docket #34). The order further provided that "[a]lthough the dispositive motions deadline is not being extended at this time, the parties are advised that they may file supplemental motions should discovery provide additional grounds or information." On April 16, 1997, the Court granted the joint motion to extend the discovery deadline to June 30, 1997 (*see* docket #54). No request was received to extend the discovery or dispositive motions deadlines, and the Court has allowed sufficient time for the filing of any supplemental motions after the conclusion of discovery.

(C) being regarded as having such an impairment.

Id. (emphasis added).

According to plaintiff, he met with defendant Wooster on July 29, 1991, to advise him that because of the stress plaintiff had been under because of the news Plaintiff's wife wanted a divorce and his counselor's advice regarding same, plaintiff needed to take time off. Plaintiff was given time off beginning on July 31, 1991. Plaintiff received a letter dated October 9, 1991, from Richard L. Elliott, Executive Assistant to the President, concerning plaintiff's leave of absence. The letter requested a doctor's statement supporting the disability requiring plaintiff to be off of work and to include the anticipated date of return to full duty. Plaintiff responded to Mr. Elliott on October 15, 1991, advising him of plaintiff's counselling session in Houston and the advice he was given to take an extended "leave of absence due to work-related as well as family-related stress." Plaintiff closes this letter by stating he was eagerly awaiting his return to active duty but "to return prematurely would retard my recovery and could be a threat to my very life."

Mr. Elliot also received letters from various physicians concerning the plaintiff. In a letter dated October 16, 1991, Dr. Trevino stated that plaintiff was in good physical condition but his mental status "showed Depression and Anxiety secondary to intense stress over his divorce." Dr. Trevino advised that a more reasonable time frame for plaintiff to return to work would be at the first of the new year when he anticipated Mr. Comeaux would be off all medications. Plaintiff's clinical psychologist advised Mr. Elliot in a letter dated October 19, 1991, that he had been seeing the plaintiff in

counseling since August 6, 1991 for the

> alleviation of anxiety and depression resulting from stress related to severe marital difficulties that have been seriously compounded by his past excessive work history. The marital difficulties have not resolved favorably, and he is currently in the midst of divorce proceedings. His hearing is tentatively set for November 7, 1991. I would definately [sic] not recommend he return to work until at least that time, and would recommend his not returning to full time work until the beginning of 1992. I would also recommend that, in view of his work history, i.e. his tendency to work excessively or "workaholism", that he attempt to work no more than 45 hrs/week until his life is sufficiently stabilized, and his work habits sufficiently self-regulated.

Acknowledging receipt of Dr. Trevino's letter, defendant Wooster sent a letter to plaintiff dated October 21, 1991. In that letter, defendant Wooster inquired whether plaintiff should be filing a claim under the Worker's Compensation Act because plaintiff's letter implied that an extended leave of absence was needed due to work-related stress. Plaintiff was advised that an extension of leave must be requested if additional time was needed.

Plaintiff responded to defendant Wooster's letter and requested an extension of his leave of absence under the sick leave policy until he was released by his doctor to return to active duty. In his letter dated October 26, 1991, plaintiff wrote he had been advised by Dr. Trevino and his clinical psychologist that he should be sufficiently recovered and off

his medication by the first of the New Year. Plaintiff anticipated returning to active duty on the first work day of 1992, providing he had been released by Dr.Trevino. In an attempt to clear up any ambiguity concerning his situation plaintiff explained as follows:

> I believe you are in possession of letters from Drs. Trevino and Ehrisman regarding my situation. I believe they stress that my treatement [sic] has been for alleviation of anxiety and depression resulting from stress related to severe marital difficulties. And yes, part of the cause of those marital difficulties was the excessive work history which severely handicapped my relationship with my wife. While working primarily with Dr. Ehrisman for the relief of my depresion, we are attempting to make significant and imperative changes in my work lifestyle in order to make me a better, more well-rounded and balanced individual, and, to accomplish this, requires, in part, dealing with work-related stress. However that is only part of the counseling process. The depression, itself, in not work-related.

Plaintiff advised he had begun a 12-step program for long-term solution to my problem with workaholism. Thereafter, in a letter dated December 27, 1991, Dr. Trevino advised Mr. Elliott that Mr. Comeaux was seen in his office that day and "[h]e is cleared for full unrestricted return to duty. He may return to full time duty as of January 2, 1992. Plaintiff did return to work as scheduled but maintains he was still under the 45 hour/week restriction.

Given this background, the Court finds that plaintiff's

condition does not fit within the meaning of disability under the ADA. Although plaintiff does not state which of the three-part definition he relies on to prove disability under the ADA, the evidence does not support a finding that his impairment substantially limited one or more of the major life activities. *See Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 & n.1 (5th Cir. 1997) (when major life activity at issue is working, term "substantially limits" means "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."); *see also Kolpas v. G.D. Searle & Co.*, 959 F. Supp. 525, 529-30 (N.D. Ill. 1997) ("inability to work more than forty-hours per week by itself does not constitute a substantial limitation on the major life activity of working"; "the ADA does not protect people from the general stresses of the workplace"); *Duff v. Lobdell-Emery Mfg. Co.*, 926 F. Supp. 799, 808 (N.D. Ind. 1996) (inability to work more than normal 40-hour week, without more, not substantial limitation on major life activity of working). Likewise, in order to fall under the two remaining portions of the three-part definition of disability under the ADA, the individual must have a record of an impairment that substantially limits a major life activity or be a person regarded by an employer as having an impairment that substantially limits a major life activity. *See Shpargel v. Stage & Co.*, 914 F. Supp. 1468, 1474 (E.D. Mich. 1996) (to have a record of such impairment "means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities"; to be regarded has having such an impairment means (1) impairment does not

substantially limit major life activities but is treated by a covered entity as constituting such a limitation; (2) impairment that substantially limits major life activities only as a result of the attitudes of others toward the impairment; or (3) has none of the impairments defined in the section but is treated by employer as having substantially limiting impairment). No evidence has been presented to support a finding under either of these provisions.

IV. CLAIMS UNDER THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT

Plaintiff contends the defendants unlawfuly terminated him from employment and then failed to recall him, in substantial part because of his exercise of protected free speech rights, specifically including campaigning for the office of President of defendant Local, all in violation of plaintiff's rights under 29 U.S.C. § 411 (a) (1) and (2). Defendants contend that plaintiff's termination from his position as a business agent does not fall within the purview of the Labor Management Reporting and Disclosure Act (LMRDA). In suport of their contention, defendants rely on *Finnegan v. Leu,* 456 U.S. 431, 436-37 (1982), in which the Court stated:

> It is readily apparent, both from the language of these provisions [29 U.S.C. §§ 411 (a) (1) and (2)] and from the legislative history of Title I, that it was rank-and-file union members—not union officers or employees, as such—whom Congress sought to protect.
>
> [D]ischarge from union employment does not impinge upon the incidents of union membership, and

> affects union members only to the extent that they happen also to be union employees.

Defendants maintain plaintiff was laid off because of economic conditions requiring his termination, and the failure to recall after plaintiff began organizing political opposition to the incumbent administration falls within the rule set forth in *Finnegan*.[2] *Id.* at 442 ("whatever limits Title I places on a union's authority to utilize dismissal from union office as a part of a purposeful and deliberate attempt ... to suppress dissent withing the union,' it does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own").

In response, plaintiff argues the *Finnegan* principles do not apply because the letter to plaintiff informing him of the layoff cited economic reasons not differences of ideology between plaintiff and defendant Wooster.[3] Plaintiff main-

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[2] At his deposition, defendant Wooster testified that he was the sole decisionmaker in deciding to lay off the plaintiff. He testified that he considered the following factors in making his decision: (1) plaintiff was probably the least experienced business agent; (2) they way he did seniority, plaintiff was on the bottom of the list; (3) "you're constantly having to argue with his or he's his constantly not — having his own agenda and not wanting to follow the program or the agenda that's laid out. And eating up time with it"; and (4) plaintiff being the highest paid person on staff with the exception of defendant Wooster and the secretary treasurer.

Defendant Wooster also testified that plaintiff was not recalled because plaintiff was ineligible for the program which hired additional employees after plaintiff's lay off. In addition, after the lay off, plaintiff started distributing handbills attacking Mr. Wooster's leadership of the union. Mr. Wooster testified that as a member, plaintiff attended the meetings and could do what he wanted, but could no longer expect him to do plaintiff any favors.

[3] The letter read as follows:

As discussed at staff meeting during the last several months, Local 455

tains the *Finnegan* case does not apply to protect an out-going officer's right to terminate a prespective opponent to his hand-picked successor who has not yet won election and the subsequent right to practive patronage. In reply to these arguments, defendants maintain the termination was for economic reasons but contend that plaintiff's employment as a union official is not protected by the LMRDA's "Bill of Rights." As to plaintiff's argument that *Finnegan* does not apply to protect an out-going officer's right to terminate a prospective opponent, defendants point first to the fact that plaintiff has cited no authority for his proposition and second that neither the "Bill of Rights" nor *Finnegan* speak to the timing of any adverse employment actions. *Finnegan* is relevant for the proposition that "elected union officials have the right to choose a staff whose views are compatible with their own."

As set forth in *Adams-Lundy v. Association of Prof. Flight Attendants,* 731 F.2d 1154, 1156 (5th Cir. 1984):

> The primary objective of the LMRDA is that of 'ensuring that unions would be democratically governed and responsive to the will of their memberships.'

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footnote 3 continued

is being forced to reduce our servicing staff and office staff due to the extreme financial burden placed on this Local Union because of the AppleTree situation.

After reviewing all factors, I regret to inform you that you will be layed-off, effective October 3, 1992. You will remain on a recall list for six months, and will be considered for rehire, along with others, if a position for a full-time Business Representative becomes available.

Thank you for you past service to this Local Union and Good Luck in the future.

> Rank and file union members are granted rights under the Act to protect them from abuses of power by the union leadership. Union leaders, *per se*, are not themselves a protected class under this Act, except that they, too, may not be deprived of the basic right attending on union membership. (citations omitted.)
>
> Under sections 101 (a) (1) and (a) (2) of the LMRDA, 29 U.S.C. §§ 411 (a) (1) and (a) (2), members of labor organizations have the right to vote in union elections and to express independent opinions on matters of concern to the union.

Plaintiff does not claim that he was denied the right to vote or express his opinions on matters of concern to the union as a rank-and-file member. In fact, plaintiff testified that he ran for president and voted in the election—he stated he agreed to and voted for Bill Hopkins who was not the hand-picked successor of defendant Wooster and who ultimately won the election.

Therefore, for the reasons stated above and those contained in defendants' motion and reply, and after review of the record as presented, defendants' motion for partial summary judgment (docket 33) is GRANTED.

V. CONSPIRACY CLAIMS IN VIOLATION OF 42 U.S.C. § 1985 (3)

In his complaint, plaintiff maintains defendant Wooster conspired with other employees and agents of defendant Local and defendant International to injure plaintiff in his employment relationship. The acts committed in furtherance of the

conspiracy included terminating plaintiff in a false lay off and failing to recall him. plaintiff claims his rights were violated under 42 U.S.C. § 1985 (3).[4]

Defendants Local and Wooster seek dismissal pursuant to FED. R. CIV. P. 12 (b) (6) of plaintiff's conspiracy claim under 42 U.S.C. § 1985 (3). Defendants contend plaintiff must allege and prove "some racial or perhaps otherwise class-based discriminatory animus behind the conspirators' action." Plaintiff acknowledges that he does not allege any form of race based discrimination but relies upon his rights of union free speech and association protected by the "Bill of Rights" to stand for election to union office.

The purpose of enacting section 1985 (3) was to "protect the civil rights of individuals from 'class-based, invidiously discriminatory animus behind the conspirators' action.' " *Liberty County Officers Ass'n v. Stewart,* 903 F. Supp. 1046, 1056 (E.D. Tex. 1995). In order to prove a private conspiracy under this section, a conspiracy of class based discrimination must be shown which is " 'aimed at interfering with rights' that are 'protected against private, as well as official encroachment.' " *Id.* From a review of the complaint, plaintiff makes no claim of "class based discrimination" but claims a conspiracy to "injure plaintiff in his employment relationship" and in violation of "plaintiff's rights." Private disputes of "feuds" have been found to be outside of the in-

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[4] Although the complaint refers to § 1985 (2), counsel for defendant International noted at the last status conference that (2) was a typographical error and should reflect (3) the "private" conspiracies subsection. Plaintiff moved to amend to correct this error in his response in opposition to the motion for partial dismissal (docket #49), and it is so granted. Defendants address subsection (3) in their reply to plaintiff's response (docket #52).

tended scope of § 1985 (3). *Runyon v. United Brotherhood of Carpenters and Joiners of America, AFL-CIO,* 554 F. Supp. 859, 863 (D. Col. 1982). Moreover, because no violation of the LMRDA has been found, there can be no § 1985 (3) conspiracy regardless of whether plaintiff's rights have been affected. *See McLellan v. Mississippi Power & Light Co.,* 545 F.2d 919, 925 (5th Cir. 1977) ("there can only be a deprivation of the rights of a plaintiff when the action of the defendants is *otherwise* illegal. If the defendants have not conspired to act contrary to law, an object of a section 1985 (3) conspiracy has not been made out and the section is inoperable, regardless of whether the legal rights of the plaintiff are somehow affected.")

Therefore based on the foregoing and the authorities cited by defendants in their motion and reply, defendants' motion to dismiss (docket #35) is GRANTED.

VI. LIABILITY OF DEFENDANT INTERNATIONAL FOR DEFENDANT WOOSTER'S ACTIONS

Defendant International filed a separate motion for summary judgment concerning plaintiff's allegations under the LMRDA and § 1985 (3). International contends there is no evidence by the plaintiff to indicate any effort by the International to authorize, ratify or participate in defendant Wooster's employment decisions. Attached to its motion are the affidavits of former and current presidents specifically denying any involvement in plaintiff's lay off. In addition, International has provided a copy of its Constitution which provides that local presidents make the employment decisions for the local unions and may not obligate the International

Union for any contractual or debt obligation.

Based on the record presented and because the Court has dismissed plaintiff's claims under the LMRDA and § 1985 (3) as to defendants Local and Wooster, plaintiff's claims against defendant International are also dismissed. Therefore, defendant International's motion for summary judgment (docket #37) is GRANTED.

ORDERED, SIGNED AND ENTERED this *30th* day of Sesptember, 1997.

/s/ Fred Biery

FRED BIERY
UNITED STATES DISTRICT JUDGE

APPENDIX 3

900576

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO RIO DIVISION

FILED
SEP 30 1997

ROBERT L. COMEAUX	:	
	:	
Plaintiff,	:	
	:	
VS.	:	CIVIL ACTION
	:	NO. SA-94-CA-0771
UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL AFL-CIO, CLC; and RAY B. WOOSTER,	:	
	:	
Defendants.	:	

JUDGMENT

On this date came on to be considered the Judgment to be entered in the above-styled and numbered cause.

Consistent with the Order filed in this cause on this same date.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the motions for summary judgment (docket #s 33 and 37) and the motion for dismissal (docket # 35) are GRANTED such that all of plaintiff's claims herein are DISMISSSED. Motions pending, if any, are hereby DENIED.

ORDERED, SIGNED and ENTERED this *30th* day of September, 1997.

/s/ Fred Biery

FRED BIERY
UNITED STATES DISTRICT JUDGE

APPENDIX 4

900604

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
DEC 29 '97

ROBERT L. COMEAUX	:	
	:	
Plaintiff,	:	
	:	
v..	:	**CIVIL ACTION**
	:	**NO. SA-94-CA-0771**
UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455 UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL AFL-CIO, CLC; and RAY B. WOOSTER,	:	
	:	
Defendants.	:	

NOTICE OF APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

Notice is hereby given that Robert L. Comeaux, Plaintiff pro

se in the above-styled case, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Court's Order on Plaintiff's Motion for New Trial signed and entered November 25, 1997.

Respectfully Submitted

BY: /s/ Robert L. Comeaux

ROBERT L. COMEAUX, Plaintiff, pro se
702 West French Place
San Antonio, Texas 78212-3636
(210) 732-7789
(210) 732-7786 Facsimile

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion has been forwarded to

Eric H. Nelson, Esq.
3303 Main Street, Suite 300
Houston, Texas 77002

Patrick M. Flynn, Esq.
1235 North Loop West, Suite 1235
Houston, Texas 77008

on this *24th day of December, 1997.*

/s/ Robert L. Comeaux

APPENDIX 5

900344

CHRONOLO WPS Comeaux Chronology

August 1992

Comeaux had met with Sandi Borowicz regarding starting a staff union for Local #455. Comeaux also spoke with Sandi's friend Joe from Detroit who was assisting the Local on the strike who had been instrumental in their forming a union at his Local.

Protection from political reprisal before the election next year was a concern of everyone involved.

August 30, 1992 Comeaux met Greg Schulze at Mathias' Pub in Houston to hear Mark Wallney to play guitar and sing. Comeaux tells Schulze that Comeaux will run for president of Local #455. Schulze tells Comeaux that he is already pledged to support Richard Elliott.

He says his rationale for supporting Elliott is to avoid divisiveness. Comeaux said the local was divided due to inept leadership and greedy officers, that if people of vision and experience don't continue to offer themselves for office, the local will continue to go downhill.

Comeaux said that people with leadership skills, experience, and vision had to be willing to risk their jobs on behalf of the members and that Greg was taking the coward's way out by supporting the status quo. He told Greg that his conscience would bother him the entire campaign, and he would have to learn to live with himself.

Late August, 1992 Comeaux saw a memo from Wooster to the servicing staff (business agents) offering to waive the $23 initiation fee for new member ($1wk for 23 weeks) for any new member who joins the ABC—Active Ballot Club during this limited time offer. If, as Wooster claims, the Local is broke and that is why I had to be laid off, then why did they take the fiscally irresponsible step of lessening the operating capital of the Local in exchange for increasing the political fund of the Local?

The political fund was taken out either in January, or in June and $10 would be deducted once and only once. Potential members signed in August might have paid their $23 initiation fee (or part of it) by the end of the year, but might have quit before the $10 was deducted in January.

Even if they waived the fee for the new members, the Local was required to pay an initiation fee to the Interna-

tional, so waiving the fees hurt the Local by having less revenue coming in while not reducing the revenue going to Washington.

The reality is that the Local was sacrificing operating funds for political funds.

September 12, 1992 Saturday. Comeaux is in the office to pick up supplies for use on picket line and is dressed in shorts and t-shirt. He had not been invited into the office for a meeting, but those staff members who were serving as business representatives were all in the office and all invited to the meeting prior to its occurrence.

Wooster came yelling down the hallway for all representatives to get into the meeting. Since I had not been invited, I did not think he was speaking to me. Then he came down the hall and said: "Comeaux, last time I checked you were on the payroll. Get your butt in here." All others were in business attire suitable for servicing the stores.

Wooster again reiterated that he would be retiring and again announced his support for Richard Elliott. He stated that he hoped that Richard would have no opponent because the local could be divided like Kansas City was divided.

He mentioned that he had staff cutbacks, and he didn't see any additional cuts in the foreseeable future. He stressed the importance of servicing the stores and continuing to sign up new members. He said that your family has to understand the demands of your job or to hell with it.

He complained that some staff members had not yet contributed to the Hurricane Andrew fund for our members who had lost everything. He said he didn't understand why those of us with good staff jobs had to be asked a second time—wouldn't we want someone to help us if the table were turned. Then he issued a very thinly-veiled threat: "Those of you who cannot find $100 to contribute to this good cause will wish you could have found the money if several months down the road the International Union decided to end their subsidy."

Comeaux had been asked by Roy Davila to contribute, and told Roy that he just couldn't contribute at this particular time, citing divorce expenses, moving expenses, daughters college and private school tuition, the extra money he had to spend on moving, etc.

9/13/92

Before working picket line, Comeaux wrote a letter to Wooster taking issue with the misplaced priority of job over family expressed by Wooster in the September 12, meeting and citing his

status as a recovering workaholic. After walking picket line, he revised the letter. In the evening, he called Kari and discussed the letter with her, and she encouraged Comeaux to deliver the letter, even after acknowledging that the letter might get him fired.

(Kari and her son Tyler had moved into Bob's house with him. Bob was unable to help them in the move because he was in Houston where he was forced to work several weeks without a day off or a return to his domicile. The Local would have a Houston representative — Tom Edwards — service San Antonio stores and stay in a hotel while the Local saying we had to cut costs. Edwards was home every weekend. Comeaux was the only representative who was forced to spend these long days and nights away from his domicile. Mike Podkanowicz was gone a lot, too, but much of that was voluntary. All the while, Comeaux was not supposed to work over 45-hours week, but he knew he would be fired if he complained, and he had always pulled way more than his load.

September 14, 1992 Comeaux meets with Elliott on two issues.

1) General grievance filed by Comeaux

on behalf of 29 named and numerous unnamed clerks concerning calculation of their wages under the minimum wage increases. Comeaux has made it clear to Elliott and to Roy Davila (Comeaux supervisor) that Comeaux needs to sign off on any resolution to this grievance as is standard practice in the local. Elliott agrees to meet with Comeaux on 9/16 between Comeaux's picketing shifts (morning shift — 9 - 11, afternoon shift (3 - 7)) to review file with Comeaux before Elliott signs off on it. Elliott says he is ready to resolve the grievance.

2) Letter of disagreement with Wooster's remarks in 9/12/92 meeting. Comeaux gives Wooster's letter in unsealed envelope to Elliott and Comeaux leaves. A few minutes later, Elliott comes out and asks Comeaux if it's okay if Elliott reads the letter. Comeaux tells Elliott he doesn't care if Elliott publishes it. As he leaves the office, Elliott can be seen by Comeaux reading the letter while shaking his head.

September 14, 1992 At 1 or 2 PM that same day, there was a scheduled Executive Board meeting to be chaired that day by Elliott.

September 14, 1992 At 7:30 p.m. that day was the regular quarterly meeting of the membership at the same Holiday Inn Express where

Comeaux was staying. On Saturday at the meeting, Comeaux was told that it was not necessary to be at the meeting, but he attended anyway.

The minutes of that day's executive board meeting were read and approved. Those minutes did not contain a single mention at this meeting of any additional layoffs. Comeaux subsequently asked for and received permission to review the minutes of the meeting and verified no mention of layoffs.

September 15, 1992 Tuesday. Comeaux was removed from coordinating picket line and told he needed to walk picket by himself at Clear Lake because Paul Cloer, an International Staff rep. had just fired all of the pickets. Comeaux immediately believes this is retaliation for the letter he wrote. Comeaux believes he will be fired for his political beliefs and seeking to enforce the restriction meant to protect his health.

Comeaux reminds Roy Davila that "today's payday" meaning the picketers are expecting Comeaux or someone to deliver their picket checks. Davila allows Comeaux to deliver their checks — over 200

miles of driving — with the understanding that tomorrow, Comeaux will walk the picket line in Clear Lake City.

September 16, 1992 Wednesday. Comeaux was assigned to walk picket line by himself in Clear Lake City. He was notified of a change in picketing schedule that morning with new hours being from 9:30 - 11:30 am, and 2:30 - 6:30 pm. Clear Lake City is about an hour drive from Local #455 where Comeaux is scheduled to meet with Elliott between shifts on the issue of the Kroger grievance. Thus, Comeaux could be in the office from about 12:30 - 1:30 only, then would have to go back to the picket line.

About noon, Comeaux calls Elliott from Armand Bayou Park pay phone to let him know about the insufficient time to drive in to review the file. Comeaux offered to come into the office that evening to review the file and have it ready for Elliott the next morning:

Elliott: "Bob, I resolved those grievances last week."

Comeaux: "What? Don't you remember our conversation on Monday morning that we would meet today on this grievance?"

Elliott: Are you challenging my

right to resolve those grievances?"

Comeaux: (Felt he was being lulled into an insubordination trap, put up his defenses: "No, Richard, but I've made it clear to you and to Roy that I wanted to be consulted before we resolved this grievance.") (That was standard operating procedure.)

Elliott: Made a sttement about how many years he has been resolving grievances.

Comeaux: "Richard, I've said all along that I could be wrong on this grievance, but until somebody sits down with me and explains why I'm wrong, I have to pursue it. If someone shows me how I am wrong, then I'll sit down with the 29 members and explain to them that I was wrong. What's the problem with that? That's what we talked about on Monday. Why didn't you tell me then?"

September 16, 1992 1:15 pm. Comeaux is eating at Colosseum Italian Restaurant in Clear

Lake City when he gets a beep. Becky tells him that Wooster has just returned and wants to meet with Comeaux at 2 pm.

Comeaux tells her he still has a few checks for the fired pickets, and they are expecting to get those checks from 3 - 5 pm, that they complained the previous day when the checks were not available to them. Comeaux asked for instructions and was put on hold. Comeaux was instructed to go to the picket line until Roy Davila arrived and give the checks to him, then head to the office.

Davila drives up at 2:45 pm and asks Comeaux "Why are you leaving the picket line?" Comeaux replies that they just called him in to the executive office. Davila asks what for. Comeaux replies: "Don't you know, Roy, they're going to lay me off!" (Comeaux trained Roy back in 1972, and though they have differences, they are both friends.)

Roy is on the executive board as recorder. He said: "There's no more layoffs!" Comeaux says: "Yeah there are. You watch."

September 16, 1992 3:30 pm. Comeaux gets to the office. Wooster style is same as day he called Comeaux in after Comeaux showed

support for Steve Marak — Head cocked to the side and downwards, no eye contact, talks out of side of mouth: "Well, Bob, we've been telling staff for several months there will be layoffs. I have a letter for you."

Bob shows no emotion, having prepared himself during the hour ride for the meeting.

Wooster said: "As an International Vice President, I have taken the liberty to ask the International if they have any openings. The International has imposed a freeze on hiring until after the International Union convention [in Toronto] next year. I would be happy to give you a letter of recommendation."

Wooster said Comeaux could either leave that day or stay overnight and he would have Greg Schulze drive him to San Antonio. Comeaux opts to stay that night.

APPENDIX 6

900443

UFCW
Local Union No. 455, AFL-CIO

September 16, 1992

Mr. Bob Comeaux
702 W. French Place
San Antonio, TX 78212

Dear Bob:

As discussed at staff meetings during the last several months, Local 455 is being forced to reduce our servicing staff and office staff due to the extreme financial burden placed on this Local Union because of the AppleTree situation.

After reviewing all factors, I regret to inform you that you will be layed-off, effective October 3, 1992. You will remain on a recall list for six months, and will be considered for rehire, along with others, if a position for a full-time Business Representative becomes available.

Thank you for your past service to this Local Union and Good Luck in the future.

Sincerely,

/s/ Ray B. Wooster
Ray B. Wooster
President

RBW:bc

DEPOSITION EXHIBIT
12

APPENDIX 7

REBUILD
TO FORM A MORE
PERFECT UNION

TIRED OF GETTING YOUR UNION BUTT KICKED?

That's the substitle of an article inside from the Texas AFL-CIO *Labor News.* On the right side of the page is the REBUILD Committee response.

The Wooster-Elliott philosophy is the "servicing model" — one of control of the UFCW membership. The REBUILD Committee philosophy is the "organizing model" — one of empowering the membership through Reforming, Educating, Building, Uniting In Leadership Development.

Make no mistake about it: Wooster and Elliott do not advocate change — they like things just the way they are. Meanwhile, the union gets weaker and weaker.

When the REBUILD Committee advocated changes in the bylaws, Wooster-Elliott send business representatives to stores on a Sunday morning to try to squash the democratic reforms. Staff even went to some members' homes to try to collect the petitions.

When the REBUILD Committee raised key questions about Wooster-Elliott's handling of the AppleTree strike disaster, Wooster-Elliott called a meeting of AppleTree strikers, the first meeting in six months of picketing!

When REBUILD Committee members were visiting with AppleTree strikers, staff members on union time and in union vehicles followed the Committee member for over 20 miles

And it was because of our leadership in the fight for reforms that I was "laid off" in September, despite 20 years of service to the UFCW and the AFL-CIO.

But, because of a growing desire by rank-and-file members to "take back our Union!", the changes we seek are becoming possible. If you agree that it is time for rank-and-file members to build a powerful union — *to form a more perfect union* one that is truly owned by the membership, then we invite you to join the REBUILD Committee by filling out the form on the back of this brochure and mail it in today.

Thank you for your support! Send us your ideas on how we can make our union stronger.

In Solidarity,

/s/ Bob Comeaux

Bob Comeaux, Chair
REBUILD Committee

opeiu #120

afl-cio

APPENDIX 8

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT L. COMEAUX	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION
	§	NO. SA-94-CA-0771
UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455 UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL AFL-CIO, CLC; and RAY B. WOOSTER,	§	

AFFIDAVIT

CLARA JEAN BANE BEING FIRST DULY SWORN SAYS:

1. MY NAME IS CLARA JEAN BANE. MY ADDRESS IS 3606 LAKE RIDGE BEND SPRING; TEXAS 77380-2430.

2. I AM OVER TWENTY ONE YEARS OF AGE AND I UNDERSTAND THAT I AM UNDER OATH.

DEPOSITION EXHIBIT
1

3. I AM PRESENTLY UNEMPLOYED. MY LAST EMPLOYER WAS THE UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION No. 455, AFL-CIO-CLC. I WAS LAST EMPLOYED BY LOCAL 455 FROM JANUARY 3, 1994 TO APRIL 10, 1995.

4. FROM JANUARY 3, 1994 TO A DATE IN JUNE OF 1994 I WAS EXECUTIVE SECRETARY TO THE NEWLY ELECTED PRESIDENT OF LOCAL 455, MR. BILL HOPKINS. I WAS PAID $550.00 PER WEEK AS A SALARY.

5. I TOOK MR. HOPKINS CALLS, MADE HIS TRAVEL ARRANGEMENTS, HANDLED HIS APPOINTMENTS, SET UP HIS FILES, AND SERVED AS HIS PRIMARY CONTACT WITH THE LOCAL'S CLERICAL STAFF. I WAS HIS PERSONAL EXECUTIVE SECRETARY.

6. I WAS OFFERED THE JOB OF BILL HOPKINS' EXECUTIVE SECRETARY AFTER THE LOCAL ELECTION BALLOTS WERE COUNTED IN NOVEMBER 1993. MR. HOPKINS MADE THE OFFER TO ME AT MY HOUSE.

7. ON THE EVENING MR. HOPKINS OFFERED ME A JOB AT MY HOUSE, ROBERT COMEAUX WAS THERE. BOB HAD BEEN STAYING THERE AND USING MY PHONES, COMPUTER AND FAX MACHINE TO ASSIST BILL HOPKINS WITH HIS ELECTION CAMPAIGN, AS WELL AS TO COMMUNICATE WITH HIM AT MY HOME.

8. MR. HOPKINS SPOKE TO MR. COMEAUX BEFORE HE OFFERED ME A JOB. AFTER MR. COMEAUX WAS FINISHED, MR. HOPKINS THANKED ME FOR MY EFFORTS, TOLD ME HE WOULD NEED AN EXECUTIVE

SECRETARY AND OFFERED ME THE JOB. MR. HOPKINS TOLD ME THAT HE HAD WORKED THINGS OUT WITH BOB COMEAUX AND THAT MR. COMEAUX WOULD BE COMING BACK TO WORK FOR THE LOCAL AS PART OF THE NEW TEAM. HE SAID THAT THINGS WERE GOING TO BE ROUGH. EVERYONE WOULD HAVE TO LEARN A NEW JOB AND COOPERATE WITH EACH OTHER. IN SPECIFIC REFERENCE TO MR. COMEAUX, MR. HOPKINS AGREED WITH ME THAT UNDER THE PREVIOUS ADMINISTRATION, MR. COMEAUX HAD BEEN WRONGED WHEN HE WAS TERMINATED. BRINGING MR. COMEAUX BACK WAS PART OF BILL HOPKINS' OVERALL PLAN TO CREATE A EFFECTIVE TEAM AND GET THE LOCAL BACK ON TRACK.

9. SEVERAL WEEKS AFTER I STARTED WORKING FOR THE LOCAL IN JANUARY 1994, I ASKED MR.HOPKINS WHY MR. COMEAUX HAD NEVER BEEN REHIRED. MR. HOPKINS SAID THAT MR. COMEAUX HAD RENEGED ON A DEAL TO RETURN TO WORK AND WAS NOW DEMANDING SO MUCH MONEY THAT THE LOCAL WOULD GO OUT OF BUSINESS IF MR. COMEAUX TERMS WERE MET. HE ALSO SAID, "SOONER OR LATER HE'LL RUN OUT OF MONEY AND HAVE TO GO TO WORK".

10. I HAD PREVIOUSLY WORKED FOR LOCAL 455 FROM MAY OF 1990 THROUGH AUGUST OF 1992. AT THAT TIME THE PRESIDENT OF LOCAL 455 WAS RAY B. WOOSTER. AT THE TIME I WAS ALLEGEDLY "LAID OFF" (IN AUGUST 1992), I WAS ON MEDICAL LEAVE RECOVERING FROM SURGERY ON A HERNIATED DISK. I WAS NOT THE LEAST SENIOR STAFF MEMBER

AND SEVERAL JUNIOR MEMBERS OF THE STAFF WERE RETAINED, I WAS GIVEN APPROXIMATELY TWO WEEKS NOTICE OF THE "LAY OFF", WHICH TERMINATED MY DISABILITY PAY (PARTIAL SALARY). I WAS TOLD THE LAY OFF WAS TEMPORARY AND THAT THE LOCAL WOULD CONTINUE TO PAY FOR MY HEALTH INSURANCE.

11. PRIOR TO JULY 31, 1991, ROBERT COMEAUX WAS A LOCAL 455 MANAGER. HE WAS THE ORGANIZING DIRECTOR AND I WAS BY THEN A BUSINESS AGENT. AT A STAFF MEETING WITH ALL THE ORGANIZING AND SERVICING STAFF PRESENT JULY 31, MR. COMEAUX MADE AN ANNOUNCEMENT HE HAD BEEN MEDICALLY ADVISED TO TAKE LEAVE. HE WAS TAKING LEAVE TO START TO RECOVER FROM WORKAHOLISM. I WAS SURPRISED THAT MR. COMEAUX WAS TAKING THE ADVICE, BUT NOT SURPRISED THAT HE HAD BEEN DIAGNOSED AS A WORKAHOLIC. I TYPICALLY WORKED IN EXCESS OF 60 HOURS PER WEEK AND HE WORKED NOTICEABLY MORE.

12. SOME OF THE STAFF WERE UNSYMPATHETIC TO MR. COMEAUX'S PERSONAL PROBLEMS. THEY THOUGHT HE SHOULD BE ABLE TO HANDLE HIS DIVORCE WITHOUT TAKING OFF FROM THE USUAL PACE. LOCAL 455 EXPECTED ALL SERVICING STAFF TO WORK MORE THAN 55 HOURS PER WEEK. TYPICAL WORK HOURS FOR SERVICING STAFF WERE 9:00 AM TO 9:00 PM, FIVE OR MORE DAYS PER WEEK. THE COMMENTS OF PRESIDENT RAY WOOSTER ABOUT THE WORK LOAD WERE, "THIS IS WHAT IS

REQUIRED, IF YOU CAN'T DO IT, WE WILL REPLACE YOU." STATEMENTS TO THIS EFFECT WERE MADE ON A REGULAR BASIS BY MR. WOOSTER AND HIS EXECUTIVE ASSISTANT, RICHARD ELLIOT, AS WELL AS SENIOR STAFF REPRESENTATIVES.

13. I HAD A PRIVATE CONVERSATION WITH LOCAL PRESIDENT RAY WOOSTER WHILE MR. COMEAUX WAS ON MEDICAL LEAVE. I WAS TALKING TO MR. WOOSTER ABOUT A PERSONAL FAMILY MATTER. MR. WOOSTER CLEARLY ADVISED ME NOT TO TAKE OFF WORK. HE SAID THAT I COULD WORK IN THE OFFICE AND SUGGESTED TO ME THAT MR. COMEAUX DIDN'T NEED TO BE ON LEAVE FROM WORK BECAUSE OF A PERSONAL PROBLEM. (GOING THROUGH A DIVORCE). HE DIDN'T MENTION THE WORKAHOLISM. HE SPOKE SARCASTICALLY AND SUGGESTED TO ME THAT HE FELT THAT MR. COMEAUX WAS ABUSING THE SYSTEM BY TAKING OFF.

14. ON DECEMBER 8, 1992, I SPOKE TO GREG SCHULZE - A SENIOR REPRESENTATIVE AT THAT TIME. THE END OF OUR CONVERSATION WAS ABOUT MR. COMEAUX THINKING HE HAD A CHANCE TO WIN AN ELECTION AS PRESIDENT OF LOCAL 455. I MADE A COMMENT TO GREG, "THAT'S WHAT THEY NEED" (REFERRING TO CHANGE)—"LEADERSHIP IN PLACE OF DICTATORSHIP." ON DECEMBER 9, 1992, I WAS WRITTEN A LETTER BY RAY WOOSTER STATING THAT MY LAYOFF STATUS HAD BEEN CHANGED FROM TEMPORARY TO PERMANENT. I, THEREFORE, IMMEDIATELY LOST MY PAID HEALTH INSURANCE AND HAD TO OBTAIN COBRA COVERAGE AT MY OWN

EXPENSE. ($440.00 PER MONTH), THIS WAS ABSOLUTELY ESSENTIAL BECAUSE MY HUSBAND HAD PREVIOUSLY HAD A HEART ATTACK.

15. PRIOR TO DECEMBER 8, 1992, I LEARNED THAT GREG SCHULZE HAD A DIRECT REPORTING RELATIONSHIP TO RAY WOOSTER AND RICHARD ELLIOTT, HIS EXECUTIVE ASSISTANT. MR. SCHULZE AND OTHER SENIOR ASSISTANT AGENTS WERE EXPECTED TO REPORT ABOUT WHAT THEY HEARD IN THE FIELD. IT WOULD BE ENTIRELY CONSISTENT WITH MY KNOWLEDGE OF GREG SCHULZES' RELATIONSHIP WITH MESSRS. WOOSTER AND ELLIOT TO BELIEVE THAT HE IMMEDIATELY REPORTED OUR DECEMBER 8, 1992 CONVERSATION TO THEM, WHICH IN TURN LED TO MY PERMANENT LAYOFF AND LOSS OF INSURANCE.

Dated SEPT. *18th*, 1995

/s/ Clara Jean Bane
CLARA JEAN BANE

SWORN TO AND SUBSCRIBE BEFORE
THIS *18* DAY OF *SEPT.*, 1995.

/s/ M.D. Grimes
NOTARY PUBLIC
MY COMMISSION EXPIRES
9-18-95

M.D. GRIMES
MY COMMISSION
EXPIRES
October 26, 1995

Supreme Court, U.S.
FILED

NO. (2) 981504 JAN 27 1999

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM 1998

ROBERT L. COMEAUX

Plaintiff-Appellant

V.

UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC; RAY B. WOOSTER

Defendants-Appellees

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI VOLUME II

THAD HARKINS
HARKINS, LATIMER & DAHL, P.C.
405 N. St. Mary's Street, Suite 242
San Antonio, Texas 78205
(210) 527-0900 (Telephone)
(210) 527-0901 (Facsimile)

COUNSEL OF RECORD FOR APPELLANT/PETITIONER

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

89pp

APPENDIX 9

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interchange. I did exactly the same thing, and
[2] Robin continued to follow me. It was okay with me
[3] if he followed me but I was going to my mom's
[4] birthday party in Baytown. And Robin followed me
[5] until he got to the Channel View exit, and then he
[6] got off of the freeway.
[7] I later talked with Rita Orsack, who was
[8] the person in charge of the picket line at Lake
[9] Jackson, Texas, and they were very angry with Robin
[10] because he was supposed to have been there early
[11] afternoon with their checks, and he wasn't there
[12] until nearly 5:00. And so many of the people who
[13] came from a good distance to walk the picket line
[14] there had to wait until the next day or the next
[15] work shift before they got their checks
[16] After - well, the next summer after I
[17] had agreed to support Bill Hopkins' candidacy for
[18 the president of Local 455, Miles Anderson and
[19] Sandy Borowicz, B-O-R-O-W-I-C-Z, were working with
[20] me in San Antonio. They had been exiled to San
[21] Antonio to get them off the playing field, and they
[22] spent a lot of time at my house lamenting that
[23] fact. And one of the things that Miles Anderson
[24] told me was that he had been instructed by Ray
[25] Wooster and later by Richard Elliott to monitor my

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[1] activities and report back to the office when my
[2] car was visible in San Antonio and when it was not.
[3] And he talked about how difficult that was, because
[4] there were five or six vehicles around my house.

By this time, in order to conserve my money, I had rented out all four bedrooms upstairs in my house, and I was living in the downstairs room, and so all the people who lived in the house had vehicles.

Q. Did Mr. Anderson specifically give you to understand that he was instructed as part of his job to monitor your movements?

A. Yes, he did.

Q. All right. I didn't meant to interrupt you, except I wanted to clarify that.

MR. SCHULMAN; Let's take a little break.

(Lunch break.).

Q. (BY MR. SCHULMAN) All right. Mr. Comeaux, returning your attention to sometime to the time period when you were campaigning and distributing what you described as your REBUILD petitions, were there other repercussions that you would like to describe for these gentlemen?

A. Yes. Jean Bane, B-A-N-E, had been laid off prior to my layoff, and when she was laid off,

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they continued making her health care payments whereas when they laid me off, they immediately told me I'd be on COBRA the next month if I wanted to continue.

In December when I was passing out the petitions, out of the blue for the first time since she had been laid off. Greg Schulze, S-C-H-U-L-Z-E. called Jean Bane and asked her if she had talked to me. And I think Jean Bane refers to this in Exhibit I. But shortly thereafter, Jean Bane received a letter from the local union telling her

that her layoff was permanent and that if she wanted to continue with health care benefits, that she'd have to self-pay COBRA.

MR. NELSON: By the way, I don't have Exhibit 1, I forgot to tell you that earlier, but when he just mentioned it - so at some point I'd like to get a copy of Exhibit 1.

MR. SCHULMAN: Okay. No problem.

MR. NELSON: Sorry.

A. And Jean Bane told me that she felt that was retaliation for her friendship with me.

Q. (BY MR. SCHULMAN) All right. Mr. Comeaux, do you know of any occasion when Defendant Wooster referred, say, after your

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termination, hopefully or approvingly to the end of your political activity?

A. He made a comment to a staff meeting of the local in December of 1992 that they would not have to worry about me after December 31st of 1992, that I would be history because my eligibility for membership would have expired. I was told this by Miles Anderson at my house around August or September of 1993. Miles mentioned this staff meeting where this was brought up.

MR. NELSON: When did Miles tell you that?

THE WITNESS: In August or September of 1993.

MR. NELSON: Thank you.

Q. (BY MR. SCHULMAN) Did Mr. Anderson tell you if anybody answered Wooster?

A. Miles told me that he had commented that,

"You don't know this guy. He'll find a way to maintain his membership."

Q: Please tell these gentlemen, Mr. Comeaux, if you have ever heard any specific reference to an attempt to blacklist you, using that word "Blacklist."

A: In the end of January of 1993, there was

a meeting at the Holiday Inn Express for the AppleTree employees. This was during the period of time when we were continuing the petition for the REBUILD Committee. And the local made the decision to call the first meeting for the AppleTree strikers that had been held in six months. I attended that meeting.

Afterwards, I was speaking with Rita Orsack and another person from her store in the parking lot when Robin Phillips came up to me and started taunting me and - you know, taunting me about the fact that I had not been able to secure a job with the international or a job with one of the other local unions, and very, very - he certainly gave the impression that that was not going to take place and that the word was out not to hire me.

Q: After your termination, were you ever told specifically that the management of the Kroger Company received a request from any agent of the defendants not to hire you?

A: I received a statement from Sandy Borowicz in August or September, I believe, 1993. This was after - this was at a time when I knew that my only chance for emplolyment in the industry was in the Nacogdoches store, which came out of the

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Dallas division of Kroger: and that Sandy had been their business agent, and my only hope for getting a job there was through Sandy.

Before Sandy would open that door, I had to pledge that I would vote for and assist Bill Hopkins in his attempt to become president. And I explained to Sandy that I intended to be a candidate and would be on the ballot if there was any way in the world I could be on the ballot, but I did pledge that I would vote for Hopkins and encourage many of my supporters to.

So she did open the door for me there. and I got the job in Nacogdoches. She also gave me a statement, and she and Miles Anderson both pledged to give a statement to the NLRB on my behalf.

We talked about the strategy of the timing of my unfair labor practice against Kroger at a time that would try to diminish the influence Kroger was having on the election process. Sandy gave me a statement, and in that statement she quoted Jim Ogren, Jr., store manager at Kroger 12 at North Sheppard and 11th Street in Houston where I had secured employment.

After he laid me off, then he realized in

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a day or so who I was and that I had slipped through the cracks. And he - Sandy's statement alludes to the fact that he said, "How was I supposed to remember this guy that they told us not to hire after so many months?" And also the fact

that he would lie on the stand if necessary to protect his ass.

Q: All right. Would you tell these gentlemen, please, if you encountered a situation where someone employed by one of the defendants undertook to push or shove you or call the police when you were lawfully present at a union meeting?

A: I believe it was the October 1993 union meeting where I had gone to present Richard Elliott with a letter, and I walked in the door, and he immediately was angry upon seeing me. And I had driven over from San Antonio that night with Cruz Rodriguez and Joan White. And immediately upon me handing that letter to him, he told me I should mail that letter, and he pushed me and told me to get out of the meeting.

He called Roy Davila over and asked Roy to contact the security guard and have me thrown out. I told Richard Elliott that I was a bona fide rank and file union member and I had no intentions

of leaving the meeting.

By this time, I had been employed at the Nacogdoches Kroger store, had worked on the 30th of September and the 1st of October. And I do not believe the union was yet aware that I had secured that employment. Because of the previous situation that occurred to me at Kroger Number 12, I did not volunteer which Kroger store I was employed at.

The security guard came. Later the hotel manager came and had discussions with Richard and Roy. I talked to the hotel manager myself since I had stayed at that hotel for several months that

summer before being terminated, told him he didn't need to get involved, and he said he had to do whatever the people who were renting that room told him to do.

The police were called, and the police came. I did not talk to the police myself. But Richard opened the meeting, and he made the comment that if he asked the sergeant of arms to escort me to the door, that if they got me to the door, then the police would arrest me, but he didn't think there was any necessity in that, that he would allow me to stay as long as I didn't open my mouth. And I immediately stood up and said. "I

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have been defending the rights of the member of this union for 23 years, and I have no intention of being silenced. I am a rank and file member."

Q: All right. Now, you've already testified about the process of being terminated or theoretically laid off in a reduction in force. Do you know if Local 455 or the international or some combination of the two hired anyone for employment at Local 455 after you were terminated.?

A: About a month, maybe six weeks after my termination, the local union or the international or through a combination - I don't know exactly what the funding was - but brought 14 people on staff to do work that I had done in the past was capable of doing, wanted to do, et cetera.

Q: What do you know, if anything, that you can share with these gentlemen about who was hired?

A: Well, I know that one of the people that

was hired was a man named Lupe Dominguez. Lupe Dominguez had been on the staff previously, had serviced the stores in San Antonio during the period of time when John Dominguez was in Arizona trying to figure out whether or not he was going to accept that job and prior to my taking over the zone of stores in San Antonio.

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After I took over the stores, in a staff meeting in which I was present. Ray Wooster announced that he had terminted Lupe Dominguez, that Lupe Dominguez was a thief, that Lupe Dominguez had stolen $400 worth of the members' money by making phone calls to his girlfriend in San Antonio on the local union's credit card, and, you know, would never work again in the local. That was sometime between January 2nd and May of 1992. But it was very, very public and very, very overt comments by Ray Wooster.

And then right after I am terminated, all of a sudden Lupe Dominguez, who was popular in San Antonio and was Hispanic and knew the way around - they had a political problem once they terminated me, and they needed to solve the political problem, and one of the ways they do it is by overlooking past actions that were criticized openly in the staff meeting.

Q: Okay. Now, did you appeal or attempt to appeal your termination to the executive board of the local?

A: I did send a letter to Ray Wooster asking to appeal my termination. In the correspondence, he said that the bylaws gave me the right to appeal

termination on a layoff, but that he would make an exception without setting precedent. He allowed me to come and speak -

Q: Could you describe, please, what happened when you were allowed to come and speak?

A: Well, Ray Wooster relinquished the floor so that he could participate in the activities - relinquished it to Richard Elliott. And Ray made some comments, open comments. I remember he told the executive board that Doug Dougherty, who was the organizing director at the time, had asked him to hire me because they had wanted me to move to Washington, D.C., at my previous position with the international union, and that I wanted to stay in San Antonio. And so he wanted the local to hire me, and Ray Wooster said as a favor to me, he hired me so that I wouldn't be fired by the international union.

I cannot say what conversation Doug Dougherty ever had with Ray Wooster on that, but I can tell you that Doug Dougherty at no time ever discussed with me that I would be terminted if I didn't move to Washington, D.C. In fact, before I accepted the job with the international union, it was under the understanding that I would never be

required to move to Washington, D.C., and that I would not even consider it until my younger daughter graduated from high school.

But in that meeting, there were a number of the excutive board members present who had

worked at AppleTree stores that had long since closed, and the records of the local union would reflect that they were the only member of their store still paying dues. I do not know if they were self-paying their dues long after they - under the rules that Ray Wooster was trying to say applied to me as far as how long I could maintain my membership. I don't know if they were extending that period of time or whether or not the local union was paying it. But some of the stores had closed five, six months earlier,, and so people were voting on me who were not entitled to membership in the organization, according to what Ray Wooster was - how he was interpreting the constitution at that time.

Q: How he was interpreting the constitution applied to you, you mean?

A: How it applied to me.

MR. SCHULMAN: All right, Mr. Comeaux, I am finished asking you questions,

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Q: Do you know whether he was upset about the letter?

A: My knowledge of Ray Wooster is such that he would have been ballistic.

Q: And what day did you get the notice of your termination?

A: I got it that afternoon within a few hours, I'd say 3:00, 3:30 or so on September the 16th.

Q: Well, do you think your letter had something to do with your being laid off?

A: I believe that this and many other

factors were the cause of my layoff: the fact that I was going to be seeking the presidency of the local union and that they understood that - they could see a pattern of my recommendations, a pattern of my participation in staff meetings where I opposed racism, where I encouraged participation of communities on behalf of our members, where I talk about technology, where I talked about political involvement, and where I had expertise in a number of different fields were very, very important to our membership.

And they also knew that I had, when I was with the Houston organizing project, run a staff of

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30 people, had run very effectively a multimillion dollar payroll, and, you know, had the experience in hiring people, training people, motivating people, getting production out of people, and working a lot smarter than we were working at Local 455. And I consistently tried to push us to working in a more professional - and working smarter than we were working hard.

And I think that in addition to my standing up for myself and standing up for other people in stating that - you know, in oppositon to statements that your family - that you have to make a decision between your family or your job, and that your family either needs to accept it or to hell with it. I'm not going to stand for things like that any longer. I may have in the past, but I won't again.

(Deposition Exhibit 8 marked.)

(Discussion off the record.)

Q: (BY MR. FLYNN) Bob, we've handed you a document we've marked for identification as Deposition Exhibit 8. Could you tell us what that letter is?

A: This is a letter to international president William Wynn, which I enclosed a copy of

the letter Exhibit - asking the international president whether or not it was the policy of the international union or solely the one of Local 455 to threaten with reprisal those employees who are unable or choose not to contribute to a specific fund: and secondly, whether it was a policy of the international that our jobs are more important than our families.

Q: And did you make reference to you being laid off in that letter?

A: Yes, I did.

Q: Okay. Now, your reference to reprisals, were you referring to being laid off?

A: I was referring to the comments made by the international vice president Ray Wooster in the meeting on Saturday where he had said, "Those of you who cannot come up with $100 at this particular point may wish you had in a few months if the local union cuts the subsidy to the local and we have to have another round of layoffs."

He had already said in that meeting that we had already had all the layoffs that we have to go through at this particular time, that there are not any additional layoffs in the foreseeable future. And then he came up with what I viewed as

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a veiled threat, that you either pony up now, those of you who make $40,000 a year, you know, pony up to this Hurricane Andrew fund to help our members who lost everything, or you'll wish you had down the road if the international union cuts the subsidy.

Q: Is that the reprisal you were referring to?

A: Yes.

Q: And I take it you didn't make that contribution?

A: I did not make the contribution. I explained in the letter why I could not afford to.

(Deposition Exhibit 9 marked.)

MR. SCHULMAN: Since you're being so good about taking notes, Mr. Nelson, this is a letter to Ray B. Wooster dated October 5th, 1992. from Bob Comeaux.

MR. NELSON: Thank yoou. Mr. Schulman, sir.

MR. SCHULMAN: Okay.

Q: (BY MR. FLYNN) Now, we've given you a document - Exhibit 9, is it?

A: 9.

Q: Could you identify that for us, please:

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that store into Austin. And as I think I mentioned previously in the deposition, my belief was that the actions we were taking by going out there, instead of building community support by giving the rank and filers an example of what was going to be

happening to them if they went out on strike,and deliberately provoking confrontations with police officers was very, very chilling to the effect we were trying to have. And I think I've already mentioned that in the deposition.

Q: Would you say that the strike participation in Houston was also very small?

A: Yes, I might add in Austin, a number of our strongest people walked off the job on July 3rd after the judge declared bankruptcy, and they had already on two occasions said that — told the local to strike if that happened. And when the local refused to do what the local said they were going to do, the members just said, "To heck with both of them. We're going to find different jobs and get on with our lives." So that also was detrimental to the participation by our members in the Austin area.

Q: Do you recall how the AppleTree matter finally ended? I guess it was after you were gone.

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but -

A: The local union - whether there's any hand by the international or not, I don't know. But the local union called off the striking effort. I think they announced they were going to just continue a boycott of AppleTree. But at the time that that happened, it was done in such a way that only a very small handful of AppleTree members who continued to bring their dues into the office were eligible then to participate in the election of 1993. Most of the people who had walked picket for 14 months were not eligible to vote in that

election.
Q: Do you know when the local called off the strike? Just approximately when?
A: (Witness nods head.)
Q: No?
A: It would be August or so, thereabouts, or maybe September of 1993, somewhere in that time frame.
Q: And when was the local union election?
A: November 1993.
Q: And you were a candidate for president in that election?
A: I was a candidate for president in that

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election with the caveat that I've already explained that in oder to be on the ballot, I had to sell my soul to Bill Hopkins to get me the job, and I had to pledge that I would vote for him, which I did, and work for him, which I did, et cetera.
Q: So you were a candidate. Bill Hopkins was a candidate, and Richard Elliott? All three of you were on the ballot -
A: Yes.
Q: - in November 1993?
A: Right.
Q: And then there was a runoff -
A: In December -
Q: - in December of 1993?
A: - 1993.
Q: Between Bill and Richard?
A: That's correct.
Q: And Bill won?
A: That is correct.

Q: You had made mention in your September 13, 1992, letter, Exhibit 7, and in your testimony about some vacation time that you were denied to move. When was that? When was that? What month and year was that?

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A: I can't recall the exact week right now, but the records of the local - we were required like by March to put in our request for vacation, and it was consistent with that request. That was in and approved. And, I mean, I do have a copy of that, but not right here readily available.

The reason I had chosen that week was that my parents' 50th anniversary was in January, but it was at a time when my sister had just had cancer surgery, and it was also a time that a lot of the family could not get in with their - they may have - my brothers or sisters came in, but their spouses and kids couldn't come in. So my parents had planned a big Saturday mass and barbecue and party for everybody they've ever met in their life, and I was allowed to go to that.

But then Sunday, Monday and Tuesday were to be a family reunion that we try to have every three years. I was going to leave that family reunion early, if I recall, go with my younger daughter, who was running in the Junior Olympics in Los Angeles. This was within six months after the divorce. My daughter was - you know, again, I was custodial parent basically, or the one she was living with, and I wanted to be able to go over

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there and show support for her.

Q: Do you recall the month and year?
A: It was July of 1992.
Q: Okay.
A: And then the Friday, Saturday and Sunday, I had planned to move back from the apartment into my house. And I had my brother and his wife from San Antonio, my brother from Austin, and some neighbors, their spouses, who were able to work with me on that day to help me get the move done. My vacation was denied me.

Sandy Borowicz was allowed to take her vacation. Vincent Mack was allowed to take his vacation. They both were far less senior people than I was.

I finally - in order to move, but prior to the time my daughter started school for her senior year, I was able to get Richard Elliott to allow me a Tuesday and a Wednesday to move. Again, he refused to allow me to have a weekend to move where I could get some capable assistance from my friends and family who had obligations during the week.

Q: Do you know why?
A: Yes, Well, I can give you the stated

reason why
Q: Okay.
A: The stated reason, as Richard Elliott gave in correspondence to me, was that because of the importance of Saturdays in grocery stores and because we have to put our members first, that he could not allow me to take off such an important

day as Saturday, you know, for the task of moving.
Q: And were you the business rep in San Antonio at that time?
A: I was assigned to the AppleTree situation.
Q: In Austin?
A: In Austin at the time that I moved, yes. Okay?
Q: And so Mr. Anderson was there with you also in Austin?
A: He was in Austin with me as well. And there were some other people, too, other reps from other locals who were, you know, working in Austin. There was plenty of people there.
Q: So what was the real reason that you think -
A: The real reason was that -
Q: - in your opinion?

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A: The real reason was punitive, not to punish me for anything I did, but the fact that I was, you know, a qualified, capable individual who was going to be seeking the office of president, and they had to get me out of the way. You know, how do we push this guy over the limit? What's his breaking point? They hadn't found it then. They haven't found it yet, okay? That's a little editorial for the benefit of whoever wants to listen. But that was what they intended to do.
And I was then sent that Saturday to Brenham, Texas, to replace Mike Podkanowicz. P-O-D-K-A-N-O-W-I-C-Z. Mike Podkanowicz later on told me that he had not requested off, he did not

need to be off, he enjoyed being on the road, he was single, he had no family obligations. And the fact that I was sent to Brenham, Texas, was simply to show I got the power over you, and this is what I'm going to do to you.

Q: And right before that, you said that they did or did not let you off for the 50th anniversary party?

A: They let me off for the party itself. okay?

Q: And what day was that?

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A: That was on a Saturday, maybe July 25th. But, again, I've got it in my file. I've got a copy of the invitation to it.

Q: So this was like the Saturday week after, or not?

A: No. This would be right before - or this would be in August of '92, because I know one of the things that I indicated I needed to do also was - it was right before August 15th, because I'd also filed an extension for income tax purposes. and I had to deal with my ex-wife on, you know, getting the income tax out of the way. And so that had to be done by August 15th. That's why I was recommending the time frame that I did. And instead, they gave me Tuesday and Wednesday, not the Friday, Saturday and Sunday.

Q: But the Saturday, July 25th, you did get off for the 50th anniversary party?

A: I did get off that one day.

Q: And the following Saturday probably would have been August?

A: Right.
Q: And that was the day you were also requesting off that you're talking about now. that -

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A: Okay.
Q: I'm a little confused.
A: Had I been granted my vacation, I would have had that Saturday of the party.
Q: The one you did get off?
A: The one I did get off. And it would have gone through the following weekend. You're right. I would have been off that week.
And as I mentioned and stated in the letter, I was not able to get everything out of the apartment. It cost me an additional month, and it cost me additional utilities.
Q: You're referring to this letter?
A: The letter of September 13th.
Q: Oh.
A: An additional moving truck.
Q: Now, at that time -
A: Could I add one other thing?
Q: To what?
A: To the situation about the moving
Q: Okay.
A: And that is that within a few months of this particular time. Miles Anderson moved from his location to another location, was given three days to move despite the fact that he lived in Austin.

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was able, after duties in Austin, to pack up, unpack, things of this nature, whereas, you know, I

was miles away and was not given the same opportunity, the same amount of time. So, again, another example of disparate treatment.

Q: And you said that the reason for this disparate treatment, in your opinion, is because you were a candidate for the presidency of the local?

A: That is correct.

Q: And it's correct that you had not formally announced at that time; isn't that correct?

A: I had not made a formal declaration, but there were people who knew that I was going to be seeking that office, and a prudent person, and I would include in that listing Ray Wooster. Richard Elliott, Bill Hopkins, and others that would have put my name on that list.

Q: When did you formally announce your candidacy?

A: I told Greg Schulze - I asked Greg Schulze for his support. I believe, on August the 30th of 1992. I formally asked him for his support.

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MR. NELSON: What date?

A: August 30th. 1992, at a club called Mathiases (phonetic). I believe that's the date. I somewhere have the receipt for that meeting. And we went to see a friend of ours named Mark Wallney. W-A-L-L-N-E-Y. He played guitar and sang. And I asked him for his support, and he told me he was already pledged to Richard Elliott.

Q: (BY MR. FLYNN) And that's the date that

you formally announced?
A: Well, there was a - if you tell Greg Schulze, you're telling Richard Elliott and Ray Wooster.
Q: Was there a more formal announcement when you sent out a first piece of literature maybe or held a -
A: Well, my first piece of literature that I mailed out was - you're talking about an election that was held in November of 1993. My first piece of literature went out a considerable time later.
Q: If I was just -
A: My purpose -
Q: - a rank and file -
A: My purpose at that time of my life was winning a battle on behalf of AppleTree employees

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okay?
Q: If I was an AppleTree employee, a rank and file member, when would I have known that you were running for the president of Local 455?
A: Much later. I don't know exactly what time.
MR. SCHULMAN: Somebody is out there signaling me, so may I take a little break?
[Break.)
Q: (BY MR. FLYNN) Bob, do you remember my last question?
A: Refresh me, please.
Q: If I was a rank and file member from AppleTree or one of the other chains, when would I have learned that Bob Comeaux was a candidate for president of Local 455, approximately?

A: The people walking the AppleTree picket line, many of them received petitions about changes that I felt - reforms that I felt needed to be made in late November, early December of 1992.

Q: You didn't refer to yourself as a candidate for president, though, in those documents, did you?

A: In those, I did not.

Q: These were the REBUILD petitions?

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A: That is correct.

Q: So it would have been sometime in '93. then?

A: Many of the people at AppleTree knew - during the course of doing those petitions, we were talking about the necessity of making reforms in the local union, including the necessity of running people for office.

And shortly after those petitions in January of 1993, were the nominations for delegates to the 1993 Toronto convention. And the REBUILD Committee did run a slate of candidates for those positions, including myself, and we did a mailing to the entirety of the membership.

Q: Again, that mailing did not say "Bob Comeaux for president of Local 455"?

A: That is correct.

Q: Okay, I'm going to ask you about the convention thing in just a moment. When would the first literature have come out specifically stating your name and being a candidate for the local presidency? Roughly what month, if you can recall?

A: That stated that I was actually a

candidate?
Q: Yes.

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A: It would probably be in September or October of 1993. But many other pieces of literature were put out with my name on it as the chair of the REBUILD Committee, including one that was handbilled in February of 1993 at the Kroger ratification meeting.
Q: When were the nominations in the local union for the officers? For the president?
A: For the president was in October of 1993.
MR. NELSON: Excuse me. When was the Kroger ratification?
THE WITNESS: February of 1993.
Q: (BY MR. FLYNN) Who nominated you in October of 1993?
A: I did.
Q: Who nominated the other candidates?
A: I don't remember.
Q: You can't recall now whether you put out any literature with your name as a candidate prior to your nomination in October of '93? I'm talking about candidate for president.
A: Most of the literature that I put out, including during the course of the campaign, was about, you know, the reforms that were necessary in the local, changes that needed to be made.

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I do remember one specific comparison handbill that I did comparing me and Richard Elliott, and prior to putting it out, I faxed it to Bill Hopkins, and he didn't like it. He thought I

was, you know, being too easy on Richard Elliott and not hard enough on me.

And I told him - I placated him. I said, "Bill, I'm not going to let you write my literature for me." I said, "But keep in mind, Bill, the only place this is being put out is in the stores that you want me to hit, to which you have no support. So the votes I'm taking away, I'm taking away from Richard Elliott and not taking away from you."

Q: What month was this?

A: This was in - I'd say it's within two to three weeks of the first election in November of 93.

Q: Again, my question was can you recall if there was any literature put out prior -

A: And I believe -

Q: Let me finish - prior to October 1993 where your name was listed as a candidate for president of the local?

A: I don't at this particular time recall

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any, although I'd have to look at all my literature and refresh myself.

Q: Okay. Now, you testified in your deposition in February that you were working on the AppleTree strike, and you got sent to a location in Clear Lake.Do you recall that incident?

A: Yes.

Q: Approximately when was that?

A: Okay. I gave the letter to Richard Elliott that we referred to, the September 13th letter, to him on -

Q: Exhibit 7?
A: I gave it to Elliott on September 13th
Q: Right.
A: The following day, Roy Davila told me that he was changing my assignment, and I was to walk picket line in Clear Lake City. He told me that the international representative, Paul Clore, had just fired all the pickets and I had to walk it by myself.
Okay. Now, as I recall your testimony in February, my note says here that you believed that that was in retaliation for writing this September 13th letter, is that correct?
A: Absolutely, Absolutely.

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can pick it up later , review it tonight, and, you know make some notes for tomorrow morning)"
And Richard said, "Bob, I resolved that grievance last week. "And I said, "Richard, I just talked to you Monday about setting up this meeting today, and you did not mention at that time that you had resolved the grievance."
And he just immediately jumped down my throat saying, "Are you challenging my right to resolve grievances?" And I knew he was trying to get me wrapped up in an insubordination charge.
And I said, "No, sir, I'm not at all. I'm just asking" - you know, "you didn't tell me that you had already resolved it. We had made this appointment.I was calling to tell you I couldn't make this appointment at this time, but I'm still interested in the outcome of the grievance."

Anyway, he failed to draw me into that - I think he was trying to entrap me with insubordination, and he failed.

Q: What do you mean by that?

A: I think he was trying to get me to get angry and yell at him or something for solving this grievance or whatever, and I didn't take the bait.

Q: He was your boss, right, so he could have

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done that?

A: He did it.

Q. Yeah.

A: Obviously he could have done it, you know, so he had every right to. But if I had challenged, you know, him doing it or whatever, he could have perhaps had grounds for insubordination. He was trying to entrap me, and it didn't work. And that was around 1:00 o'clock that afternoon, and it was maybe an hour and a half later that I was being told to come into the office when that ploy didn't work. And I do not to this day know if such a letter of agreement exists between Kroger and the Local 455.

MR. SCHULMAN: Does it? I thought I'd get to ask a question.

MR. NELSON: It's after 5:00. Mr. Flynn.

MR. FLYNN: Just a few minutes after 5:00.

A: Obviously that settlement of that grievance was going to be a major issue in the campaign. If you have people who have been working in a grocery store for three years averaging more

than 20 hours a week and are making the same amount

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of money as somebody who just started in that grocery store that is a major political issue.

Q: BY MR. FLYNN: Well, did you learn in the campaign that Mr. Elliott had made some type of settlement that the employees viewed as being unfavorable?

A. The few employees that I filed that grievance for who I have talked with since that time - I did not ever go back in in an official capacity in those stores. I've been in most of the stores on occasion when I was applying for work in San Antonio, and I ran into a few of them and wanted to know what the status of it was. They told me they had never been informed that the grievance had been dropped, and they wanted a piece of my hide, and things of that nature.

But I don't know what was communicated from that office I didn't see it. I wasn't part of it. And I don't know yet whether or not proper - or things that we had done in the past were done in this case or whether or not they just decided to drop it because Kroger was bellyaching about, you know, moving out of San Antonio.

Q. Well, did you use that in your campaign against Mr. Elliott?

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A: No, because by that time, all of the Kroger San Antonio stores had been shut down, and only a handful of the people in San Antonio who voluntarily paid their dues were eligible to vote

in that election. But I had no way of knowing this, you know, 14 months earlier that that was going to be the case.

Q: Now, you testified in February that after you got laid off, this Greg Schulze, who you identified earlier, drove you to San Antonio, is that right?

A: That's correct.

Q. Did you and he talk about your layoff?

A. Yes, we did.

Q: Tell me what you said and he said, best you can recall.

A: Well, if you would have looked at us, you would have thought that he had been the one laid off, you know, because I told him that he was gong to - I told him the time that - on August 30th when I told him I was going to run for office, and I told him again that day that he was on the wrong team, that he knew he was on the wrong team, and that his soul would give him no peace as long as he was on the wrong team.

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And Greg and I had been friends for a long time. Y'all know that Greg plays guitar. sings union songs, that kind of stuff. he never sang one until he heard one in my car. I'm the one who turned him on to union music and stuff. And so he and I go way back to the early days of his career, and I considered him one of my closest friends. I still do.

But, I mean, I didn't give him any peace at all.I just let him know that he was on the wrong program, and that he knew it was a sham

layoff offer, that this stressful time that our local was going through was the time for leadership, and he had leadership, and he was not exerting it, that this was a time to stand up on behalf of members.

I told him that I had had to wrestle with myself about whether or not I wanted to save my own neck and run for the presidency of the local or whether or not I was going to stand up and fight for the rights of the people, the AppleTree people. And I had used many times in training sessions and other opportunities I've had to say by what right do we tell people we're going to represent them at a certain time in the future if we're not

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representing them to the fullest extent of our capabilities today.

That's like saying, "Oh, yeah. Just vote for the union, get us in here, and then I'll represent you." I said, "If you're not representing them them from day one, you're a hypocrite." And I told Greg that in that conversation, and, you know, he was the one that had the long trip to San Antonio and back.

Q: Would it be fair to say that you had some pretty strong philosophical differences with Local 455 management, being Wooster and Elliott at this time?

A: And not just -

Q: Would that be true?

A: It would be true, and it would also be true to say that I oftentimes verbalized them. And it would also be true to say that they allowed me

the opportunity to do training where I told a different version about a union where the members had power and where there was strength in the grocery stores as opposed to - in the rank and file members and the stewards as opposed to strength in the staff.

Q: And one of the many areas of your

disagreement would be in signing up these sackers as opposed to the longtime members in the store? That was one area -

A: I certainly -

Q: - that you pointed out earlier right?

A: I certainly -

Q: Just answer my question and then you can elaborate: but -

MR. SCHULMAN: I don't think it's a yes or no question, and I don't think that's a fair summary of his previous testimony. I object

A: I certainly signed up my share of sackers.

Q: (BY MR. FLYNN) Okay. Let me rephrase -

A: But may -

Q: - my question.

A: - emphasis was -

Q: Let me rephrase my question. I got the impression from your earlier testimony, and you can tell me whether I'm mischaracterizing it, and that is that it seemed to me that the administration was more interested in numbers, in other words, how many members did you sign up this week. And your idea is more in quality as opposed to quantity. Would that be a fair statement? And I'm not trying

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to put words in your mouth, but that's what I gathered from what you said. Is that right?

A: Picking up where you are, I think it's more important how many members you collect on than how many members you sign up, okay?

Q: Okay. Well, did I say something wrong?

A: I don't think you said anything wrong. And I wanted to just emphasize that I've signed up lots of sackers.

Q: Yeah. I'm not saying that is wrong.

A: But my emphasis - if I have a choice to spend half an hour with a five-year nonmember as opposed to 10 minutes with a guy that just walked in the door and hasn't had his first break doesn't know where the john is, I'm going to sign up that long member and build with strength.

Q: Okay.

A: And my strategy was a perimeter strategy. You get the people who are outside the check stands, get them first, get them locked in, because everybody who's in that front end wants to go into one of those positions.

And so I actually put a recommendation to Wooster and Elliott - to Elliott saying that I have many stores in San Antonio where several

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record?

(Discussion off the record.)

A: And this was, you know, part of a pattern that existed not just in Local 455, but as I mentioned, in Local 99R, as a means of stifling

descent. It happened here in Dallas local and, you know.-

Q: **BY MR. NELSON)** Is this a class action lawsuit?

A: No, it's not.

MR. SCHULMAN: Surely you're not saying that evidence of a pattern is not admissible in this lawsuit.

MR. NELSON: I'm not going to debate legal theories with you, but it is my belief that Mr. Comeaux will have to articulate exact complaints that he has as it relates to him. And the fact that he has some hearsay complaint about something that happened to Mr. Dominguez some years ago, I don't believe is relevant to this proceeding. That's my view. You have your view.

A: Well, I received a letter from international vice president Duane Carman, who is the director of the Dallas division, notifying me that there were no openings in response to my

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request for an application for employment. And the very same day that he informed me that there were no openings until after the Toronto convention, the same exact line that was given to me by Ray Wooster several months prior to that, that very same day, that very same afternoon, I received a call from John Dominguez, who had just cut a deal with the very same Duane Carman to return to Texas, because he was a political thorn in the side of the international in Phoenix, Arizona, and if they didn't remove that thorn in the side, he would have

been the president of that local instead of their handpicked successor that they wanted to move in from Local 711 in Las Vegas, Nevada.

And those are the examples, to answer the question you asked, that I could think of, you know, without any further study.

Q: **(BY MR. NELSON)** Well -

A: I also think that the international union, through the subsidy to the local union that hired the 14 people, deliberately overlooked my qualifications, did not offer me a position, did not - knowing that I was unemployed, knowing that that I was seeking employment in the industry in San Antonio and San Marcos and New Braunfels and

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Houston, and knowing that I had superior qualifications than all of the people who they hired put together, did not even give me the opportunity to refuse whatever salary they would have offered. And I do know that the international has a hand in that process of selection.

Q: When was Mr. Carman's letter to you approximately?

A: I do not recall the date, sir.

Q: Can you give us a season or approximate time? Was it after you were laid off?

A: Oh, it was much after I was laid off. I believe it was after I was laid off from Kroger. I had had other conversations with Duane Carman and his executive assistant at the time, George Saleeby, S-A-L-E-E-B-Y, about wanting to seek employment and asking them to send me an application.

I also had a conversation immediately upon - after my termination with Jerry Bennett, who was - collective bargaining representative, I believe, was his title from the international staff.

Q: The letter was after you were laid off from Kroger in Houston?

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A: In Houston in around July of 1993, I believe, is about the time of the letter from Carmen, but the letter could speak for itself. That's to the best of my recollection.

Q. Are there any other complaints that you can think of at this point against the international other than the relationship of Mr. Wooster being an international vice president?

A: I think I talked to you just a while ago about the relationship between with Duane Carman and Jerry Bennett and George Saleeby. And the way the international union works is that they have a very high dues structure, and they grant subsidies to local unions, not always on the basis of the validity of the program but on the politics of the participants.

Q: So is part of your complaint the subsidy policies of the international union?

A: No. My complaint is that the subsidy in that particular instance clearly shows that the international vice president in charge of Local 455 - who was the president of Local 455 at the time failed to offer a person who had recall rights any opportunity for employment because he had knowledge of my intention to seek the office of

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president of the local. And to do so would have extended my rights to membership, which was a requirement of the job.

And at the same time he was denying me that opportunity, he was taking very, very overt actions to make sure that my membership ended at the earliest possible time. And in close proximity to that time, he spoke at a staff meeting in December and said that I would be history at the end of the year.

Q: Okay. My question - I believe my last question was are you complaining about the subsidy policy of the international union in this lawsuit?

MR. SCHULMAN: Object to the question. It's been asked and answered.

MR. NELSON: Well, I'm sorry. Mr. Schulman, I didn't understand the answer. I heard verbiage as a response to my question, but in that verbiage. I didn't hear it to be responsive to the question I had asked.

A: Let me see if I can make this more succinct. I believe that that policy of the international union allows them to unlawfully interfere. And in my situatiion, they did unlawfully interfere in my employment with

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Local 455 and in my desire to seek the presidency of my local, which is my right as a union member.

Q: **(BY MR. NELSON)** And the international interfered in your rights through the actions of Ray Wooster or others?

A: They interfered directly through the

actions of Ray Wooster and they failed to correct the obvious abuses and the abuses that I called to their attention in the person of Jerry Bennett and George Saleeby and Duane Carman specifically.

Q: And do you have any documentation about those things, about Mr. Carman, Mr. Bennett and the other gentleman?

A: Well, I did have correspondence with Bill Wynn that I think you introduced into evidence yesterday. I don't recall the number of the exhibit.

Q: You identified - you just identified three individuals that you made complaints about abuses?

A: That I had conversations with.

Q: And are all of those communications oral?

A: Those conversations were oral. I did have the written correspondence with Bill Wynn, and I think I had subsequent correspondence with Bill

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Wynn. I know I had - the letter I was referring to, the initial letter on October 3rd of '92, was Exhibit 8.

I had further correspondence with Bill Wynn in an attempt, which was successful, in protecting my right to membership for an extended period of time beyond the date that Wooster wanted it to expire of December 31st, 1992.

I did have correspondence with Duane Carmen when I did ask for an application. Those –are the only ones that I recall at the present time that were written.

Q: Okay. So we can have some semblance of

an organized record, you indicated that you made complaints to three gentlemen about abuses by the international vice president Wooster and how he implemented international subsidies. Is that the thrust of your testimony a few moments ago?

A: Repeat your question.

Q: The way I understood your testimony from a few moments ago is that you made complaints to Carman, Bennett, and the third gentleman -

MR. FLYNN: Saleeby.

Q: **BY MR. NELSON)** - Saleeby regarding abuses by international vice president Ray Wooster

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in how he effectuated the subsidy policies of the international union.

A: I don't believe that was my testimony, that I spoke with him about Ray Wooster's abusive policies. Subsidy programs generally emanate out of the department of organizing in Washington. At the time, Doug Dougherty was the international vice president in charge of that department.

Q: Let me stop you. Did you make complaints to those three gentlemen-Carman, Bennett and Saleeby-regarding abuses of Ray Wooster?

A: I talked immediately upon my termination to Jerry Bennett, who was in the office at the time, and let him know it was an illegal, unlawful termination. I told Jerry Bennett I would be back. Jerry Bennett asked me not to spill the beans about what was going on on AppleTree. "Don't mess with the program," he said. You look perturbed.

MR. SCHULMAN: He doesn't like the answer.

Q: (BY MR. NELSON) What I don't - my question, in my view, called for a yes or no answer, but -

MR. SCHULMAN: Mr. Nelson, look, you're trying to limit the witness to a little

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bitty box. You're saying, "Is your only complaint about the international's subsidy program?" And he's -

MR. NELSON: Mr. Schulman -

MR. SCHULMAN: - answering you by saying, "No, I complained about an illegal termination on the day" -

MR. NELSON: No.

MR. SCHULMAN: - "it happened' -

MR. NELSON: No.

MR. SCHULMAN: - "or the day after it happened."

MR. NELSON: No, that's not the situation at all as I perceive it.

MR. SCHULMAN: The record will reflect what he said.

MR. NELSON: Yes, the record will reflect everything that he said, and I'm trying to understand what it is that he has said.

MR. SCHULMAN: Okay.

MR. NELSON: Because I was asking questions, and I was getting responses that I didn't understand were in response to what had been asked. And so I'm trying to find out what it is that he was trying to say and how that fits into

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the question that I was asking.

A: Maybe this will help. Maybe this will help. A local union is a political entity. The international union is a political entity. There are money transactions between the two. The international union has an awful lot of power, and in the situation specific to me and specific to this lawsuit, the power of the purse, at both ends of this equation, from Washington and from Houston, Texas, was used to deny me - causing me to bring this action, deny me my rights as a union member to seek the office because of whatever reason they had, and furthermore, that once verbal communication with officers of the same people that I considered to be friends and coworkers and colleagues, who I had served faithfully for many years, failed to get any resolution, which is why I have been forced to bring the litigation in the first place. Does that clarify your question?

Q: **(BY MR. NELSON)** Can you tell me how it was in what you just answered, what it is that the international union did that affected your rights?

A: When they were made aware of a termination of a long term employee, not by seniority, not something that needed to be done.

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they, number one, failed to rectify that situation: number two, failed to hire me for a subsidy program of whatever duration it may have been number three, overlooked me with greater seniority and somebody in the same region as opposed to John Dominguez, who at that time was in a different region, in Phoenix, Arizona, knowing full well that I was seeking employment here, failed to offer me

the same position that I had superior qualifications for than John Dominguez, and failed to even inteview me for the position, failed to give me any consideration, and, in fact, denied in written form that any such opportunity existed until many months thereafter.

MR. SCHULMAN: Excuse me just a minute. Our pleading has arrived.

(Break.)

MR. SCHULMAN: On the record A couple of things. One matter that Mr. Comeaux was asking me about off the record was the exhibit introduced earlier that was one page out of his multipage -

MR. NELSON: 17.

MR. SCHULMAN: I think it's 17.

MR. FLYNN: Flier.

MR. SCHULMAN: Flier, yeah. He would like either for you or for us at a later date to introduce the full document -

MR. FLYNN: I have no objection. I don't have it.

MR. SCHULMAN: Okay. Then we'll try to locate one and put the whole matter into the record as another exhibit number. And as I understand it -

THE WITNESS: Could I comment?

MR. SCHULMAN: Yes.

THE WITNESS: And the reason for that is on the inside where it quotes the Texas AFL-CIO article, it basically sides with the strategy and the concept that I was trying to

promote and what I had been, in fact, doing in San Antonio that brought me into disfavor with both the local union and the Kroger Corporation.

MR. SCHULMAN: At any rate, we'd like to get it into the record for those reasons.

MR. NELSON: We can maybe make it 17-A and B or -

MR. SCHULMAN: That would be fine. The other thing is I think we've made an agreement in principle among the attorneys that we'll adjourn

APPENDIX 10

WITNESS: RAY BROWN WOOSTER, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT L. COMEAUX	)	
	)	
Plaintiff,	)	
	)	
V.	)	CIVIL ACTION
	)	NO. SA-94-CA-0771
UNITED FOOD AND	)	
COMMERCIAL WORK-	)	
ERS LOCAL UNION	)	
NO. 455 UNITED FOOD	)	
AND COMMERCIAL	)	
WORKERS INTER-	)	
NATIONAL AFL-CIO,	)	
CLC; and RAY B.	)	
WOOSTER,	)	

DEPOSITION OF
RAY BROWN WOOSTER, JR.

JUNE 27, 1996

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DATE TAKEN: 6/27/96

Parties as listed below represent all parties present at the time this deposition is being taken

A P P E A R A N C E S

MR. JOHN E. SCHULMAN
Law Offices of John E. Schulman, P.C.
1221 Merll Drive, Suite 910
Dallas, Texas 75251-2214

Counsel for Plaintiff
Robert L. Comeaux

MR. PATRICK M. FLYNN
Attorney at Law
1235 North Loop West, Suite 1236
Houston, Texas 77008

and

MR. ERIC H. NELSON
Attorney and Counselor
3303 Main Street, Suite 300
Houston, Texas 77002-9392

Counsel for Defendants
United Food and Commercial Workers
Local Union No. 455, United Food and
Commercial Workers international
AFL-CIO and Ray B. Wooster

ALSO PRESENT

Sarah Youngdahl

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Deposition of Ray Brown Wooster, Jr., taken on the 27th day of June, 1996, beginning at 10:00 a.m., in the offices of Mr. Patrick M. Flynn, 1235 North Loop West, Suite 1235 Houston, Texas 77008, before SONDRA HUMPHREY, CERTIFIED Shorthand Reporter and Notary Public in and for the State of Texas

STIPULATIONS FOR THE DEPOSITION OF

RAY BROWN WOOSTER, JR.:

The attorneys for all parties present, stipulate and agree as follows:

MR. SCHULMAN: Federal Rules of Civil procedure.

MR. FLYNN: Okay.

THE COURT REPORTER: Read and sign?

MR. FLYNN: Yes.

MR. SCHULMAN: We reserve objections except to the form of the question and responsiveness to the answer.

MR. FLYNN: Okay.

* * * * * *

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layoff. One was a letter I sent to Bob Comeaux regarding his time off. One letter was to Richard Elliott in regards to Bob's time off from work. I know there was something else.

Q. That's your local recollection?

A. Yeah.

Q. I think I handed you the letter before the deposition started that —

MR. NELSON: There you go.

MR. SCHULMAN: It's not that one. This is another copy.

MR. FLYNN: You want another copy of the one that you gave me?

MR. FLYNN: Well, I would like to have another one. Actually, I think I might have one in a different form in the file.

MR. FLYNN: This one here?

MR. SCHULMAN: Yeah. I think this is the same. Let me get the court reporter

to mark an exhibit then.

(Whereupon Deposition Exhibit No. 1 was marked by the court reporter.)

Q. (By Mr. Schulman) This is, Mr. Wooster, and we'll document this, partially identified by Mr. Comeaux in his deposition that you might remember reading about it in connection with Exhibit No. 17, I think was the first page of this document when he was testifying about it. Let me ask you if you could look over the four-page document that's now been marked as Wooster Deposition Exhibit No. 1

And my first question to you after you've had a chance to review it will be if you've ever seen this item before?

A. (Witness complies.)

Q. I'm going to hold up the other version for you to see where it was kind of in a pamphlet form that might help you remember it?

A. It seems like I've seen it. I've seen so much literature.

Q. All right. Have you had a chance to look at this piece of literature?

A. I looked at it, yes.

Q. Do you recall seeing this document, Wooster Exhibit 1, in connection with an election campaign at Local 455?

A. I do recall seeing this in an election campaign I

don't recall it. I mean. I'm not sure what you're talking about "an election campaign", I guess.

Q. Well, I guess.

MR. FLYNN: I think this came out before there were any nominations. I don't remember what Bob said when he distributed this.

MR. SCHULMAN: Okay. I see. Well, maybe that helps clarify this.

Q. (By Mr. Schulman) Did you see this before there were nominations in the campaign in which Mr. Comeaux opposed Mr. Elliott?

A. It seems like I've seen this. I don't know exactly when it was. It would have been definitely way before there was—before Bob and Mr. Elliott and Bill Hopkins had their campaign.

Q. So, you would have seen this document sometime before there were any formal nominations in that political campaign. Is that true?

A. I believe so. Yes.

Q. And you would be comfortable saying "way before"?

A. I would be comfortable saying "before". I

don't know. Well, that would be good. It probably was at least a year before because I retired a year before that. So, it had to have been prior to that, I would think.

Q. All right. In reviewing this piece of campaign literature, your name is prominent, is it not

in Wooster Exhibit 1?
A. I seen my name in here a couple of times. Yeah. I've seen my name in it.
Q. And you are identified as being the Wooster Elliott campaign, I suppose, in the document?
A. I believe that's what it said.
Q. And were you a supporter of Mr. Elliott to become president of the Local after yourself?
A. I supported Richard Elliott, yes, for president of Local 455.
Q. If you don't mind, let's take a look at that. Let's see, is this one that has—
A. I don't know.
Q. —the "REBUILD"? Yes. This is the first page on the exhibit that you have.
A. Okay.
Q. Let's look at the first page together. Obviously, the author of Wooster Exhibit 1 is

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Bob Comeaux, right?
A. I would think so.
Q. And he signed it, didn't he) Right?
A. Yes.
Q. Would you have any reason to believe that he wasn't the author of it?
A. No.
Q. Early on the first page, Mr. Comeaux suggests that there's a difference in philosophy of leadership between the Wooster-Elliott campaign and the REBUILD philosophy. One representing a servicing model and the other representing an

organizing model of leadership. Do you agree with the observation that there was a difference in philosophy? Was that an issue in that election?

MR. FLYNN: What election are we talking about now?

Q. (By Mr. Schulman) In the election where Mr. Comeaux opposed Mr. Elliott for your support?

A. I would have no way of knowing whether there's a difference in philosophy between the two or not. I was retired at that point when they ran.

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Q. So, based on your years of contact with Mr. Wooster—I'm sorry—Mr. Elliott and Mr. Comeaux, you wouldn't have enough information to say whether they had a difference in leadership philosophies?

A. No, I don't think I would. I would not want to speculate on that. I have no way of knowing where Richard would have taken a Local union or Bob would have taken it.

Q. All right. So, when you supported Mr. Elliott, then would I be safe in assuming from your testimony that you would have no way of knowing where Mr. Elliott would take the local union, that you did not talk to him about his plans for the Local before supporting him?

A. No, I talked to the — I don't know. The first part of—I don't remember the exact dates.

Somewhere in January before I announced—
before I actually resigned and made my mind up
and my date. I had a meeting at the Holiday
Inn, that I paid for, with the entire staff at
that point in time, I announced my
retirement. I told them I would choose Richard
as my successor, but that they would tell me
who they wanted. And whoever they wanted, I

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would support to the Executive Board. I don't
remember who it was. It was by unanimous vote
they selected Richard and I gave him my full
support to the Executive Board and I finished
my unexpired term and he was elected.

Q. You had a meeting at the Holiday Inn with some
group of people in which you announced that
your preference would be Mr. Elliott?

A. Yes.

Q. And who was in attendance at the meeting?

A. All the representatives on the staff.

Q. When was the meeting?

A. The first part of—right before I announced,
officially announced, my retirement. The first
part of '93.

Q. Prior to the meeting where you announced your
preference for Mr. Elliott, did you talk to
Mr. Elliott about his goals or aspirations for
the Local?

A. No.

Q. Did you refer at staff meetings, a preference
of yours, not to have a contested election?

A. I believe at that meeting that was the whole—

that was the reason why I told the staff at that time whoever they chose I would support to

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the Executive Board. I don't think I told them I preferred not to have or to have a contested election one way or the other. I don't recall the subject coming up.

MR. FLYNN: Now, you're talking about the E-Board election to choose the inner president before the official local union election

Q. (By Mr. Schulman) Let's see what we're talking about

A. That's what I'm talking.

MR. FLYNN: Is that what you're asking him about?

A. I'm talking about when I announced my retirement to the Executive Board.

Q. (By Mr. Schulman) And you placed that when in time?

What?

Q. When did you have the meeting with the Executive Board?

A. I want to think it was probably in February. It was the first part of '93. I don't remember if it was January or February in which I submitted my resignation to the Executive Board.

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together, somebody has to give. This job requires this. Your family requires that. It's up to you to work it out. The same as you being a lawyer and you being here in Houston

today. But I would never tell anybody. "To hell with their family". It would be against everything that I stood for.

Q. So, you might have told them, you have to work it out on an individual basis, get a new job or get a new family. But you didn't tell them, to hell with their family?

A. No.

Q. Do you recall that the meeting of September 12th, 1992, was held on a Saturday?

A. Yes.

Q. Mr. Comeaux apparently composed the letter the Sunday, September 13. I believe he contends that he delivered it to your assistant. Mr. Elliott, on a Monday, September 14th, 1992. Do you have any recollection of whether the letter was received by Mr. Elliott or yourself?

A. No, not myself. I received it when I got back in town.

Q. Okay. So, you were not in town after the

Saturday staff meeting?

A. No, I was not.

Q. You were at the International Executive Board meeting, correct?

A. I was in Washington. I'm not quite clear whether it was an International Executive Board meeting or whether it was an AFL-CIO convention in Washington. It might have been a combination of both. I don't recall.

Q. Mr. Comeaux asserts, I believe, that on the

Tuesday after the Monday that he turned in this letter, his assignment was changed from, I guess, what you would call picket captain over several AppleTree stores to being responsible for walking a picket at single store. Do you know anything about that?

A. I know nothing about it.

Q. Do you know whether it happened?

A. No, I do not.

Q. Mr. Comeaux testified, I think, in his deposition that if you're the person in charge of hiring pickets for a store and you fire the pickets, that you get to walk the picket line yourself. Are you familiar with that adage or practice of picket line management?

A. No, I'm not.

Q. Is it correct, Mr. Wooster, that you returned to Houston on the Wednesday after the Saturday meeting reflected in Wooster Exhibit 3?

A. I returned to Houston on the 16th, whatever day that would be. I guess we can figure it out.

Q. On the date of Wooster Exhibit No. 2, which is Mr. Comeaux's layoff notice?

A. Yes, I believe that's the day. It might have been the day before. It seems like to me it had to be the day before. I returned on the 15th. I really don't recall, but it was somewhere in that area. It might have been Wednesday. I'm not sure. I'm not sure of the actual return.

Q. Now, Wooster Exhibit 2, the layoff notice —

A. Yes.

Q. — were you in the room when that document was presented to Mr. Comeaux?
A. I presented this to Mr. Comeaux myself.
Q. You did?
A. Uh-huh.
Q. And Mr. Elliott was also in the meeting, was he not?
A. Yes, he was.

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Q. There is a contention in this lawsuit, Mr. Wooster, that at the meeting on the previous Saturday, you had told the staff that there were no more lay offs anticipated unless the International cuts its subsidy. Did you make a remark to that effect to the staff on September 12th, 1992?
A. I did not.
Q. Do you recall well enough to deny that under oath or —
A. Yes, I'll deny it.
Q. Is there any documentation that you can recall ending further layoffs at that time?
MR. FLYNN: I don't understand that. I'm sorry.
Q. (By Mr. Schulman) Sure. I mean, is there some document that would reflect there were more layoffs coming on or about Septembeer 12th, 1992?
A. Specific lay offs?
Q. Yes.
A. That I know of there wouldn't be. I mean, I guess if somebody looked at a financial statement, they ought to be able to figure it

out. But other than that —

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prior to today?
A. No, I really don't recall seeing it.
Q. Do you recall it coming to your attention that Mr. Comeaux requested the opportunity to be off on August 14th and 15th of 1992 in connection with a move?
A. I really don't recall it.
Q. Were you involved in deciding whether or not this request should be approved?
A. No, not that I recall.
Q. All right. Let me show you a very poor copy. Unfortunately, it's the best one we have of a memo to Bob Comeaux from Richard Elliott dated August 3rd, 1992. So, my first question would be — oops, we need into get this marked.

(Whereupon Deposition Exhibit No. 12 was marked by the court reporter.)

Q. (By Mr. Schulman) Have you've ever seen the document marked Wooster Deposition Exhibit No. 12 before today?
A. I don't recall seeing it.
Q. Did it come to your attention through Mr. Elliott or otherwise that he was going to

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refuse to allow Mr. Comeaux to move on Friday and Saturday, August 14th and 15th?
A. I don't recall.
Q. Did it come to your attention that what Mr. Comeaux did that weekend instead of move

was work in Brenham to substitute for someone who hadn't asked to leave?
A. Not that I recall. That doesn't come to my attention.
Q. In your meeting on September 12th, 1992, the one that occurred on the Saturday before Mr. Comeaux was terminated, when you spoke of families and jobs, did you make a reference to the fact that your wife, Marlene, knew what your sentiments were about those kind of life choices
A. Not that I recall.
Q. Now, if I'm referring to what you told me earlier today correctly, to the next week on the Monday through Wednesday when you were in Washington, you already knew that it would be necessary to layoff Bob Comeaux and you were asking the people in Washington about whether there was any work available for him, is that right?

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A. I knew I was going to layoff Bob Comeaux before I ever left town. But I wanted to check with Washington about if they would hire him back before I did.
Q. Well, maybe you can help me understand when and how and by what means the decision was made to layoff Bob Comeaux?
A. Economically, we were running out of money, depleting reserves, what little reserves we had. We could not continue the cost that we

were at.
Q. Now, when you say, "we", does that mean —
A. Local 455. I made the decision.
Q. I would like you to be as specific as you can about who was involved in the decision to layoff Bob Comeaux or when it was made and what documentation might exist of that decision making process, if any?
A. There's no documentation to that process. I made the decision. And not another person knew about it, except myself. Because I knew when I went to Washington there were all types of possibilities. Who knows, they might have wanted to add to the subsidy program to keep Bob employed. They might have wanted him

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themselves to try to workout with another Local. And at that point, I did not feel there was any need to talk about it until I found out what the options were.
Q. In the letter, layout letter, that you sent Mr. Comeaux. I think that you referred to 'considering all factors'?
A. Okay
Q. After reviewing all factors, what factors did you consider with yourself
A. One is, Bob was probably the least experienced business agent we had. Two, he was, as far as I'm concerned the way I did seniority is Bob was on the bottom of the list. Three, kind of goes back to Bob's — you're constantly having to argue with him or he's his constantly not —

having his own agenda and not wanting to follow the program or the agenda that's laid out. And eating up time with it and also being the highest paid person on staff with the exception of myself and the secretary-treasurer. The highest paid business representative at that time. Actually, I think he was working on the AppleTree at the time he was laid off, not a business agent. I'm not sure. And the need of

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reduction and everything and taking everything into consideration, he was my choice. But I thought that an outside chance — not an outside chance, I didn't know. I didn't have no percentages filled. I felt that's something that could wait because I knew I was going to Washington and I woud talk to the directors and let them talk to the people in Washington and see if there was something that could be worked out with Bob and wait until I get home and that's what I did.

Q. One factor was that he was the least experienced business agent?

A. As a business representative he was.

Q. And I guess that means as a business representative of a local union?

A. Yes

Q. He was certainly not the least experienced professional, union professional, on your staff, was he?

A. I'm not sure what you're getting at. You know, I dealt with the idea that what we're keeping is for business representatives to service

their membership. And in that respect, he was one of the least experienced we had. Bob's

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most expertise was boycotts, some organizing, I guess you would say, in that area. Not actually servicing of members themselves.

Q. Okay.

A. And enforcing of contracts. It's a little different world.

Q. So, his experience was in labor confrontation-type activities like boycotts and somewhat in organizing?

A. I would say so, yes.

Q. For example, he had been the organizing director of the Local?

A. Yes.

Q. And as such, he'd had business agents reporting to him, right?

A. No.

Q. No?

A. I had an organizing staff reporting to me.

Q. An organizing staff in coordination in whatever activities of course whatever the organizing business agent did?

A. Business agents mainly — if business agents were assigned to him for organizing, then they would — he would deal with them as far as the organizing itself was concerned. As far as

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their job as a business representative, he had no authority over that.

Q. Okay, I understand.

A. None whatsoever. He had none whatsoever.

Q. Was it your sense that the importance of organizing experience at the Local in 1992, was it was relatively less important than processing grievances and general service activities?
A. I wouldn't say it was less important. It was down to what we could financially — what the local union itself had to work with and what we had to cover. And with the AppleTree — and losing of the AppleTree membership, we could see it coming, there's just no way we could afford to payroll it. You understand, weve been in a layoff period for, gosh, I don't know how many people was laid off before Bob even. Quite a few before we even got to Bob.
Q. Now, at the time, then, that you wrote Wooster Exhibit No. 2, the layoff notice, you indicated that Bob was on recall status for six months and would be considered for rehire, correct?
A. I believe the term is that he would remain on

recall status for six months and would be considered for rehire along with others if a position of a business representative was to open up.
Q. And that was your choice of words?
A. Yes.
Q. Did you mean by that the only kind of position that Bob could be considered for on this recall status was business representative? For example, if there were organizing activities available for him to work with, he wasn't to be

considered?
A. If the Local itself was going to rehire somebody on the local union payroll. I don't think it was just absolutely limited as a business representative. It's just the term we used in that case, he worked a business rep. It really would be the only full time job that I could see coming up for awhile. I would consider him along with others that do the job.
Q. So, when you said he was on recall status, you didn't mean he had any special relationship with the Local to have a recall. He would just be considered along with the persons on the street who wanted the job. Is that what you

meant by 'recall status'?
A. I believe if I would have had a reopening for another business agent, Bob might have gotten some priority. I'm not saying that it — I guess the way to put it, I was not guaranteeing him if we had another opening as a business agent it would be his job. But he would be considered and that's what I'm saying.
Q. So, the fact that he was on a recall list, according to your letter, didn't mean much, did it? He was just the same as anybody else? He was going to be considered?
A. He would be considered. I wouldn't say the same as anybody else, but he would be considered. It was not a guarantee for a job back, either.
Q. Well, in Trade union Parlance, Mr. Wooster, a recall list generally means some kind of

preference, doesn't it?
A. It depends on your collective bargaining agreement in your contract on labor. If I'd had — at that point in time, if I'd had an opening, I wouldn't have laid Bob off to start with. It come down to me making choices. And when I made the choice, Bob was my choice.

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Q. So, his relative inexperience of servicing stores was one of the factors?
A. Was one of the factors.
Q. His high salary was another?
A. Was another.
Q. His, would it be fair to say, argumentative attitude?
A. Oh, I don't know. You can call it that if you want to. I would say it's his own agenda. It was actually having to argue with him about different things to get a job done. Instead of, this is what needs to be done and having a conversation about it.
Q. So, would it be fair to say —
A. It's days of conversations with him. Sort of like the boycotting in Austin. My gosh, you know, it didn't really fit with the program. I guess one reason I approved it, I got tired of arguing with him. I think, you know, I was just — it's just he had his own agenda is what I would say about everything. I'll give you a small example. he wanted the local union to rent his garage aparatment from him so that he could make some extra money. And I sat there and tried to tell him, I must have taken three

days until I finally just told him. I said, "Look Bob, we're not going to rent the damn garage apartment from you. First of all, it's a damn home. We can't use local union money renting something from you that is your home anyhow. It was a conflict". I mean, you know, we're going into an area where I hadn't got time for this kind of stuff. A simple, "Will you rent the apartment?" A simple, "no" should have sufficed and let it go at that. We're not going to rent his apartment.

Q. The letter of complaint that Mr. Comeaux sent September 13th — dated September 13th, 1992. Deposition Exhibit No. 3.

A. No. 3?

Q. Your No. 3, his No. 7. If I'm understanding your testimony from earlier today correctly, that couldn't possibly have influenced your decision to layoff Comeaux because you hadn't received it and you'd already made up your mind, right?

A. No, I don't think it would have. It did not change my mind, if that's what you're asking. Although, I think the meeting he's referring to is an example of what I made my decision based

on.

Q. This is sort of an example of him having his own agenda or being argumentative?

A. Well, sure.

Q. Did the letter, Wooster No. 3, help confirm the decision you had already made?

A. No.
Q. No?
A. No, the decision was already made. Like I said. I already had the decision made. I got to Washington and asked Dwayne Carmen if the International would be interested to pick him up. I was going to have to lay off people. It come down to Bob. He reported back to me that the International wasn't. They had no openings. I come home. I told Bob. And I say his augumentative styles of his own agenda and reasons I laid him off was not — I mean, even at that, I offered to help the best I could. I called other local unions for him.
Q. Now, having his own agenda, what did you mean by that?
A. Oh, what would I say? First on the agaenda is there's only one way of doing something. It's my way. I guess, if I'm the boss, I have a

Page 173

about, he was not — he was not considered for the program.
Q. Because you didn't want him, right sir?
A. I would not have considered him myself. I didn't set the rules. But quite frankly, I would not have. At that point in time, I would not have considered Bob Comeaux for reappointment, if that's what you're asking me.
Q. And what would he have done by that point in time to be ineligible for consideration?
A. Oh, I think he went forward and showed a lack of cooperation that was always there. His slander of that. Just like bypass me. I mean,

he would —
Q. The slander is things he said when he asked to appeal your decision?
A. He wouldn't appeal my decision. I didn't have to. In my opinion, I didn't have to give him that appeal. When I — the entire Constitution — if the Board would have overturned me, I would have gladly put him back. But I believe at that point —
Q. You would have gladly put him back although you wouldn't have considered him to come back?
A. If the Executive Board would have overturned my

decision, I would have gladly put him back to work. They're the ruling body even though he doesn't have — constitutionally, Bob did not have an appeal. he wanted an appeal. Fine I'll give it to him. I don't care. But if the Executive Board itself wanted him to be reinstated and would have voted by majority vote for me to put him back to work, I would have put him back to work. We would have had to lay somebody else off, but I would have abided by their decision. That's what it's all about.
Q. What slanderous things did Mr. Comeaux do or say that made him ineligible for consideration to be returned in your judgment?
A. I wouldn't say he was ineligible. When Bob was laid off and after the appeal, Bob started I guess, locally some of the handbills you have that came about later on. I don't know exactly when they all came about. He started raising

hell about — I don't know what the hell I'm doing. He ain't supporting you. He ain't doing this. He ain't doing that. No. I wouldn't put him back. I mean, If I had an open opposition, quite frankly, in one of the

stores and I was looking for a staff, if I was — I mean, if it was me — Bill Hopkins who's president of the local union. If Bill Hopkins wanted to hire somebody and he wants to hire somebody who wants to run against him, Bill Hopkins ain't going to do that and neither would I.

Q. He was disloyal?

A. He was not — first of all, not eligible for the program. And if he would have been eligible, I probably at that point in time would not have considered Bob Comeaux.

Q. Because by then, he was in open opposition to you?

A. Not necessarily in open opposition to me. I was going to retire. It's just the things he was tearing down. As a member, Bob attended the meetings. He could do what he wanted to do. I didn't care, but don't expect me to do him any favors. It's like, you know, you got to understand. When Bob was laid off, I tried to help him. Bob undoubtedly didn't want the help.

Q. Well, your help didn't produce anything. I guess. Is that right, Mr. Wooster?

A. Maybe.
Q. Bob was not eligible for the program by which the 15 people were hired why —
A. Because under specific instructions by Bill Olwell, that was an Executive International Vice President at the time, who approved the program or had the program approved, told us that all the people we put on that payroll got to be subsidy people that were already on payroll. We could not play games in moving BA's over there. They had to be members out of store and preferably, some union stewards.
Q. Bob was not a BA at the time, was he?
A. No. Nor was he union steward. Or as far as my knowledge, I'm not even sure he was working at Kroger at the time.
Q. He wasn't a subsidy person you were trying to shift around, was he?
A. No, he was laid off.
Q. But he was classified as a BA. He was just somebody with recall rights, right?
A. He did not have recall — he was subject to recall.
Q. Just whatever you meant when you wrote down being on a recall level?

APPENDIX 11

FILED
FEB 7 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT L. COMEAUX	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. SA 94 CA 0771
UNITED FOOD AND	§	
COMMERCIAL WORK-	§	
ERS LOCAL UNION	§	
NO. 455; UNITED FOOD	§	
AND COMMERCIAL	§	
WORKERS INTER-	§	
NATIONAL AFL-CIO,	§	
CLC; and RAY B.	§	
WOOSTER,	§	
	§	
Defendants.	§	

PLAINTIFF'S RESPONSE IN OPPOSITION TO THE MOTION FOR PARTIAL SUMMARY JUDGMENT OF DEFENDANTS UNITED FOOD AND COMMERCIAL WORKERS UNION NO. 455 AND RAY B. WOOSTER

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the Plaintiff, Robert Comeaux, and files this his Response in Opposition to Defendants' Motion for Partial Summary Judgment. In support of this position, Plaintiff Robert Comeaux respectfully states:

Attached Responsive Material.

Attached to this Response are the full text of Plaintiff Robert Comeaux's deposition in three volumes and the full text of Defendant Ray B. Wooster's deposition. An excellent chronological review of the facts recited from the perspective of Plaintiff Robert Comeaux is found at Exhibit 2 of Volume I of his deposition. Mr. Comeaux has given sworn testimony at Volume II, pages 153-154, lines 17 through 3, that the statements found in his chronolgy, which is Exhibit 2 of Volume I, are true.

Plaintiff submits the full text of both of these depositions (neither of which has yet been completed) to assist the Court with evaluating the pending Motion for Partial Summary Judgment and other dispositive motions which are also pending.

The Parties Agree in Part About One Issue.

Plaintiff concedes that under prevailing case law, Defendant Ray B. Wooster, while a properly named party under the Americans with Disabilities Act, 42 U.S.C. §12101 et seq., must be viewed as only being sued in his capacity as an agent of the employer Defendant United Food and Commercial Workers Union Local 455. *See by analogy to Title VII,*

Grant v. Lone Star Co., 21 F.3d 649, 651-653 (5th Cir. 1994), cert. denied 115 S.Ct. 574 (1994).

The Summary Judgment Motion Is Inappropriate Because It Is Premature.

Plaintiff has been the aggressive party in discovery in this case. So far Plaintiff has presented his own deposition for two days and deposed Defendant Ray B. Wooster for one day. However, no deposition, even of these two principal actors in the case, is completed, and other important witnesses remain to be deposed. The summary judgment effort is premature. Summary judgment should not ordinarly be granted before discovery has been completed. *Alabama Farm Bureau Mutual Casualty Co, Inc., v. American Fidelity Life Insurance Co. ("Alabama Farm")*, 606 F.2d 602, 609 (5th Cir. 1979), cert. denied, 449 U.S. 820 (1980); *Xerox Corporation v. Genmoora Corp.*, 888 F.2d 345, 354 (5th Cir. 1989) (quoting *Alabama Farm* with approval).

Standards for Summary Judgment.

All the parties and the Court know that the basic rules about summary judgment were liberalized in 1986 and that summary judgment is an ever-more popular device, especially in civil rights or employment litigation. Nevertheless, certain points are worth special notice in this particular case. The Court is respectfully asked to remember that there are seldom "eyewitnesses" to an employer's mental processes. So it is axiomatic that cases which challenge motive in employment decisions need not be proven by direct evidence. *United States Postal Service Board of Governors v. Aiken*, 460 U.S. 711, 716 (1983). Employment disputes that depend on the

employer's motive or state of mind are not well-suited for summary judgment. This is so because it is particularly difficult for the non-moving party to challenge the "self-serving testimony" of the moving party without the benefit of trial accessories, namely cross-examination. *International Shortstop, Inc., v. Rally's, Inc.*, 939 F.2d 1257, 1265 (5th Cir. 1991).

It is also significant that a lay witness's opinions about adverse employment decisions, if rationally based on his or her perceptions, are admissable. Federal Rules of Evidence No. 701 and *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1462 (5th Cir. 1989).

Fact questions and inferences must be considered with deference to the non-movant. *Waltman v. International Paper Co.*, 875 F2d 468 (5th Cir. 1989). The judge's function is not to weigh the evidence himself and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

Defendants Have Misstated the Legal Basis for an ADA Claim in Their Motion for Partial Summary Judgment.

Defendants' Motion reveals either a fundamental misunderstanding or else a misstatement about the basic elements of an Americans with Disabilities Act ("ADA") claim and the proof necessary to advance such a claim. At pages 4 and 5 of their Motion for Partial Summary Judgment, Defendants argue that Plaintiff Robert Comeaux must prove that he has a "disability" and a "record of impairment" and that Plaintiff was "regarded as having such an impairment". Based upon that statement of several allegedly

conjunctive essential elements. Defendants move for summary judgment on all ADA issues.

In fact, the ADA provides a three-part definition of a "disability" in the disjunctive. A disability is present when there is: (1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual, or (2) a record of such impairment, or (3) the individual is treated as having such an impairment. 42 U.S.C. §12102(2) (Definition section above, not cited by Defendants).

The "record of impairment" subsection of the definition, 42 U.S.C. §12102(2)(b), for example, is on its face meant to apply even if the employee plaintiff is not currently afflicted or was misclassified by the employer in the past. Similarly, the "regarded as having an impairment" subsection, 42 U.S.C. §12102(2)(c), applies to protect persons with minor ailments who are misclassified as having substantial disability or even those who do not have an impairment but are treated as if they did. The ADA is meant to prohibit employer overreactions or misclassifications as well as discrimination against persons with existing substantial limitations. *See generally,* 29 C.F.R. 1630 2(1).

Defendants' Claim of No Knowledge of Plaintiff's Disability Is Met by Evidence Placing the Matter in Dispute.

Based upon a self-serving statement by Defendant Wooster, Defendants argue at pages 4 and 5 of their Motion for Partial Summary Judgment that they had no knowledge of Plaintiff's disability. This contention is met by a great deal of evidence placing the matter in dispute.

Defendants admit at page 5 of their Motion to having received (Wooster Depo., Ex. 7) a letter dated October 19, 1991, from Plaintiff's psychologist which in fact contains a work restriction of 45 hours per week applicable upon Plaintiff's return to work until Plaintiff could become stable and self-regulating as a recovering workaholic.

Also, Defendant Wooster admitted in his deposition to receipt of Exhibit 9, a letter dated October 26, 1991, wherein Plaintiff Robert Comeaux advised Defendants that he had entered a twelve-step program as a long term solution addressing his problem of workaholism (Wooster Depo. at pp. 99-100).

Further, Plaintiff testified that after his return to work in January, 1992, he discussed his ongoing 45-hours per week work restriction with Richard Elliott, Defendant Wooster's executive assistant, and Roy Davila, another Local officer (Comeaux Depo. Vol. II at p. 163). Mr. Comeaux testified that this discussion occurred at a meeting where his restricted work schedule was brought up and his work performance was criticized by these gentlemen unfairly without proper consideration of actual performance statistics (*id.* pp. 163-164).

Plaintiff in his sworn Chronology (Comeaux Depo. Vol. I, Ex. 2) at page 21 recorded a hostile encounter at a staff meeting wherein Defendant Wooster, looking directly at Plaintiff, said, "If you can't keep up with the work load, get out now." Plaintiff reasonably took this to be a direct threat because of Dr. Ehrisman's letter limiting him to a 45-hour work week.

Finally, the court's attention is respectfully directed to

Comeaux Deposition Volume II, Exhibit 7, a letter dated September 13, 1992, to Defendant Wooster in which Mr. Comeaux wrote, among other things, "I agree that serving the union is a way of life, an honorable calling. But workaholism is a disease, one from which I am in recovery. I do not plan to go back, and I do not need you or any other person trying to make feel guilty for not working 24 hours a day."[1] Mr. Comeaux testified that the letter was written in reaction to a union staff meeting on a Saturday. The letter was finalized on Sunday. Monday morning Plaintiff gave the letter to Richard Elliott, Mr. Wooster's executive assistant, in an unsealed envelope and gave Mr. Elliott permission to read it. By Tuesday, Mr. Comeaux's job assignment had been changed and on Wednesday Mr. Comeaux was allegedly laid off for economic reasons, despite an announcement by Defendant Wooster at the meeting the previous Saturday that no layoffs were expected (Comeaux Depo. Vol. I, pp. 15-34, *especially at* pp. 15, 16, 21, 22, 33, and 34).

Plaintiff respectfully urges that the factfinder in this case should be permitted to disbelieve the general self-serving statement by Defendants that they had no knowledge of Plaintiff's disability and instead believe the direct and circumstantial evidence to the contrary described above.

Defendants Have Misstated the Law Applicable to Chronic Psychological Impairments.

At pages 5 through 7 of their Motion for Partial Sum-

---

[1] In this regard, the Court is respectfully asked to note that the ADA specifically forbids discriminating against an individual because he or she has opposed an employment practice of the employer or participated in formal enforcement activities. *See,* 42 U.S.C. §12111(10).

mary Judgment, Defendants argue that Plaintiff's impairments as a workaholic are not substantial and therefore cannot be considered a disability. As noted above, Defendants have mistakenly read the statutory definition of "disability" so that the three disjunctive alternatives in the definition must, according to Defendants, be conjunctive and all ADA cases must therefore, by Defendants' mistaken logic, involve physical or mental impairments that substantially limit one or more major life activities. As noted above, that argument is wrong.

Further, the Court is respectfully asked to note that Defendants' argument relies primarily on the holding of the Fifth Circuit Court of Appeals in *Dutcher v. Ingalls Shipbuilding,* 53 F.3d 723, 725 (5th Cir. 1995). In the Dutcher case, the Fifth Circuit was concerned with an injured arm which had little or no long-term impact on the plaintiff, including no substantial limit on her ability to work as a welder or perform other daily activities. The Fifth Circuit was correct in applying the rule that temporary impairments that do not lead to long-term substantial limitations do not fit within the first definition of "disability" found at 42 U.S.C. §12102(2).

However, the Dutcher holding is not applicable to the case of a chronic mental impairment such as workaholism. The ADA regulations define physical or mental impairment at 29 C.F.R. 1630.2(h) broadly as "Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: . . . or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." It is also significant that the

Equal Employment Opportunity Commission's March 1995 regulatory guidance on the ADA's definition of disability specifically indicates that the mental and emotional processes such as "thinking," "concentrating," and "interacting with others" constitutes "major life activities" for ADA purposes. *See specifically* EEOC Compliance Manual, Vol. 2, No. 915.002; §902.3.

The ADA itself addresses the subject of alcoholism as a disability. A person who is an alcoholic is an "individual with a disability" under the ADA (42 U.S.C. §12114), although he or she is subject to ordinary performance-based standards. *See,* 42 U.S.C. §12114(c)(4).

In summary, the Defendants' argument that Plaintiff Robert Comeaux cannot be disabled as a matter of law is wrong because it is based upon a misreading of the statutory definition of "disability" and a false analogy to a case describing an injury followed by no substantial limitations on working on any other of the plaintiff's major life activities.

Defendants' Claim that Plaintiff Was Not Disabled Within the Context of His Workplace Is Met by Evidence Placing the Matter in Dispute.

Defendants' claim tht Plaintiff was not disabled within the context of his workplace is met by evidence placing the matter in dispute. In this regard, the Court is respectfully referred to the Affidavit of Clara Jean Bane (Comeaux Deposition Vol. I, Exhibit 1), especially at paragraphs 11 and 12. In Ms. Bane's Affidavit, she describes the hours demanded of the union staff for Local 455 as "more than 55 hours per week" and threats made on a regular basis to terminate or

replace staff members who could not keep up with the workload by Defendant Wooster, his executive assistant Richard Elliott, and others. Ms. Bane also specifically describes Mr. Comeaux's former pace as noticeably more than sixty hours per week. Ms. Bane also describes no surprise to her that Plaintiff had been diagnosed as a workaholic.

If Ms. Bane's statements are taken as true as they must be at this stage in the proceedings and all inferences from them are drawn in Plaintiff Robert Comeaux's favor, the Court can easily understand why Robert Comeaux was disabled in the context of this extraordinarily stressful workplace featuring long hours and constant threats by management against those who might wish not to maintain them.

Defendants' Arguments Based Upon Union Patronage and Loyalty Principles Are Not Applicable to this Case.

Defendants argue at page 9 of their Motion for Partial Summary Judgment that Plaintiff's cause of action under the Labor Management Reporting and Disclosure Act ("LMRDA") must fail as a matter of law based upon the decision of the Supreme Court of the United States in *Finnegan v. Leu*, 456 U.S. 431 (1982), and its progeny. Plaintiff respectfully asserts that the principles of the *Finnegan* case which allow for political patronage and an elected officer's privilege to select loyal followers are not applicable in this case.

Several important facts which show that the *Finnegan* principles do not apply are admitted in the deposition of Defendant Wooster. First the Court will please note that the alleged layoff of Robert Comeaux was pursuant to a September 16, 1992, letter from Ray B. Wooster to Robert

Comeaux citing economic reasons only (Wooster Depo., Ex. 2) and not any differences of ideology between Robert Comeaux and Ray B. Wooster. In fact, Ray B. Wooster was resigning from the office of presidency and not himself standing for re-election (Wooster Depo., p. 188). Defendant Wooster testified that he would not have terminated Plaintiff were it not for the financial situation (Wooster Depo., p. 153). He also testified that Plaintiff did not do the opposite of what he was told (Wooster Depo., p. 152), was not insubordinate (Wooster Depo., p. 152), was not disloyal nor in open opposition to Wooster (Wooster Depo., p. 175), was not running against Wooster for president and Wooster was not sure that Plaintiff was running against Elliott to succeed Wooster (Wooster Depo., p. 177).

The principles of the *Finnegan* case apply to allow an elected union official to practice patronage by rewarding his or her campaign supporters and choose staff he or she trusts and considers to be loyal and likely to follow the programs of the elected official's administration. The *Finnegan* case does not apply to protect an out-going officer's right to terminate a prospective opponent to his hand-picked successor who has not yet won election and the subsequent right to practice patronage. Any political privilege not to maintain Robert Comeax in employment for ideological reasons after Mr. Comeaux lost the election belonged to the newly-elected president (who, ironically, did not at all turn out to be Defendant Wooster's executive assistant Richard Elliott).

Conclusion

For the reasons stated above, the Defendants' Motion for Partial Summary Judgment should be denied as to all issues except that Plaintiff has conceded that any liability of Defendant Wooster under the ADA is only in his agency capacity.

Respectfully submitted,

LAW OFFICE OF JOHN E. SCHULMAN, P.C.

By: /s/ John E. Schulman

John E. Schulman
SBN 17833500
12221 Merit Drive, Suite 901
Dallas, Texas 75251
972/490-4848 telephone
972/490-6737 telefacsimile

COUNSEL FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was mailed, postage prepaid, on this the 7th day of February, 1997, to counsel for Defendants.

By: /s/ John E. Schulman

John E. Schulman

TABLE OF AUTHORITIES

	CITE	PAGE
1.	*Alabama Farm Bureau Mutual Casualty Co., Inc., v. American Fidelity Life Insurance Co.*, 606 F.2d 602, 609 (5th Cir. 1979), *cert. denied.* 449 U.S. 820 (1980)	2
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14.	42 U.S.C. §12102(2)(b)	4
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21.	EEOC *Compliance Manual*, Vol. 2, No. 915.002; §902.3	7

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT L. COMEAUX	§	
Plaintiff,	§	
	§	
v.	§	
	§	
UNITED FOOD AND	§	**CIVIL ACTION**
COMMERCIAL WORK-	§	**No. SA 94 CA 0771**
ERS LOCAL UNION	§	
NO. 455; UNITED FOOD	§	
AND COMMERCIAL	§	
WORKERS INTER-	§	
NATIONAL UNION	§	
AFL-CIO, CLC; and	§	
RAY B. WOOSTER,	§	
Defendants.	§	

AFFIDAVIT OF JOHN E. SCHULMAN

Before me, the undersigned authority, on this day personally appeared JOHN E. SCHULMAN, who, after being duly sworn, upon oath stated:

"My name is John E. Schulman. I am over twenty-one (21) years of age, of sound mind, and an attorney at law duly licensed to practice in the State of Texas and before this honorable Court. I am counsel of record for Plaintiff Robert Comeaux in the above captioned case. As such, I have personal knowledge of the facts which I herein state under oath.

"Attached hereto is a true and accurate copy of the three-volume transcript of the deposition of Robert Comeaux, which was taken in this matter. A copy of this transcript was delivered to my office by the court reporter who officiated at the deposition. My office has had custody and control over the copy of the transcript since that date. The copy attached hereto was photocopied in my office from the copy originally delivered to my office.

"Also attached hereto is a true and accurate copy of the transcript of the deposition of Ray Brown Wooster, which was taken in this matter. A copy of this transcript was delivered to my office by the court reporter who officiated at the deposition. My office has had custody and control over the copy of the transcript since that date. the copy attached hereto was photocopied in my office from the copy originally delivered to my office."

FURTHER AFFIANT SAITH NOT.

/s/ John E. Schulman

JOHN E. SCHULMAN

STATE OF TEXAS

COUNTY OF DALLAS

Subscribed and sworn to before me this 7 day of February, 1997.

ANTHIA D. FRYE
Notary Public
STATE OF TEXAS
Commission Expires 11/05/00

/s/ Anthia D. Frye
NOTARY PUBLIC

My Commission Expires: 11/05/00

APPENDIX 12

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50013
Summary Calendar

FILED
OCT 02 1998

ROBERT L. COMEAUX,

Plaintiff-Appellant,

versus

UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, RAY B. WOOSTER,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. SA-94-CV-771

Before GARWOOD, JOLLY and BARKSDALE, Circuit Judges.

PER CURIAM:*

Robert L. Comeaux appeals the district court's grant of summary judgment dismissing his claims under the Labor Management Reporting and Disclosure Act and Under 42 U.S.C. § 1985 (3). Having reviewed the record and the briefs of the parties, we AFFIRM, for essentially the reasons set forth by the district court. *Comeaux v. United Food and Commercial Workers Local Union No. 455,* No. SA-94-CA-0771 (W.D. Tex. Sept. 30, 1997).

AFFIRMED.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX 13

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-50013

FILED
OCT 29 1998

ROBERT L. COMEAUX,

Plaintiff-Appellant,

v.

UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC; RAY B. WOOSTER,

Defendants - Appellees.

Appeal from the United States District Court
for the Western District of Texas, San Antonio

ON PETITION FOR REHEARING

Before GARWOOD, JOLLY and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED

ENTERED FOR THE COURT:

/s/ Will Garwood
United States Circuit Judge

REHG-2

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

(3)

Supreme Court, U.S.
FILED
APR 15 1999
CLERK

No. 98-1504

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ROBERT L. COMEAUX,
Petitioner,

v.

UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455; UNITED FOOD AND COMMERICIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC; RAY B. WOOSTER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

PATRICK M. FLYNN
1235 North Loop West
Suite 1235
Houston, Texas 77008
(713) 861-6163
Counsel of Record for Respondents United Food and Commercial Workers Local Union No. 455 and Ray B. Wooster

ERIC H. NELSON
3303 Main Street
Suite 300
Houston, Texas 77002
(713) 526-1998
Counsel of Record for Respondent United Food and Commercial Workers International Union, AFL-CIO, CLC

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178P

QUESTION PRESENTED

Whether Robert Comeaux, a dismissed, appointed union official can assert claims under Section 101 of the Labor Management Reporting and Disclosure Act (29 U.S.C. § 401) despite the fact that his rights as a union member were not affected by his dismissal.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1504

ROBERT L. COMEAUX,

Petitioner,

v.

UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455; UNITED FOOD AND COMMERICIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC; RAY B. WOOSTER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents United Food and Commercial Workers, Local Union No. 455; United Food and Commercial Workers International Union, AFL-CIO, CLC; and, Ray B. Wooster oppose Petitioner Robert L. Comeaux's Petition for Writ of Certiorari as follows:

STATEMENT OF THE CASE

A. Statement of Pertinent Facts.[1]

Petitioner Robert "Bob" Comeaux ("Comeaux") was employed by Respondent United Food and Commercial

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[1] Citations to the Record are designated thus ("R. at ——").

Workers Local Union 455. ("Local 455") as an appointed business representative from 5 August 1990 until 3 October 1992. (R. at 000141, 000450).[2] Comeaux was laid-off on 2 October 1992 because of Local 455's financial difficulties occasioned, in part, by its financial support of the striking Apple Tree grocery store chain employees, and the impending loss of Local 455's dues income from members employed by Apple Tree. (R. at 000142, 000147-000152).

According to Respondent Ray B. Wooster ("Wooster"), then President of Local 455, Comeaux was ". . . the least experienced business agent we [Local 455] had" and was on the bottom of Local 455's seniority list. (R. at 000148). Some Local 455 employees had already been laid off because of the Union's then deteriorating financial circumstances, and these same conditions necessitated Comeaux's lay-off. (R. at 000448, 000151).

Comeaux contended below that Local 455 laid him off because he had been diagnosed as a "workaholic" in 1991, and had consequently been ordered to limit his work time to no more than 45 hours per week. (R. at 000004, 000006, 000137). However, on December 27, 1991, Richard Elliott, the then-Executive Assistant to

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[2] The Statement of Facts in Comeaux's Petition is somewhat ambiguous in that it can be read to indicate that Comeaux, at the time of his termination, was an employee of Respondent United Food and Commercial Workers International Union, AFL-CIO, CLC ("International"). (Comeaux's Petition at xiii). Comeaux, at the time of his termination, was actually an employee of Local 455. (R. at 000141, 000450). Wooster made all employment decisions at issue regarding Comeaux. (R. at 000484). Wooster had not consulted the International regarding these decisions. (R. at 000484). There are no allegations of misconduct against the International except those alleged to have transpired through conduct of Wooster, who also served as one of 39 International vice presidents. (R. at 000216). Comeaux makes no specific complaint regarding the International in his Petition.

Wooster, reecived notification from Comeaux's doctor, Joe Trevino, that Comeaux was ". . . cleared for *full unrestricted return to duty*. He may return to full time duty as of January 2, 1992." (R. at 000161) (emphasis supplied).

In conformance with the releases from his doctors, Comeaux returned to work in January of 1992, working without complaint until his lay-off effective in October of that year. (R. at 000137-000138). Meanwhile, Local 455's financial position deteriorated, because of the impending loss of numerous members (and their dues) occasioned by the bankruptcy of Apple Tree. (R. at 000151). The financial difficulty of Local 455 during this period necessitated staff layoffs (R. at 000151). After deciding that he would have to lay-off Comeaux, Wooster made an informal inquiry to see if there were any openings at the International for which Comeaux might be considered, and learne there were none. (R. at 000147-151). Comeaux was notified of his lay-off, effective on 3 October, on 16 September 1992. (R. at 000443).

B. Pertinent Procedural History.

Comeaux filed this action in the United States District Court for the Western District of Texas on September 15, 1994. (R. at 000001). Comeaux complained of his lay-off from his position as an appointed business agent with Local 455 and of Local 455's and Wooster's failure to recall him for work. This was allegedly in retaliation for seeking the office of Local 455 president, in violation of the Labor Management Reporting and Disclosure Act ("the LMRDA"), 29 U.S.C. § 401, *et seq.*; the result of alleged discrimination against him by Respondents in violation of the Americans with Disabilities Act ("the ADA"), 42 U.S.C. § 12101, *et seq.*; and, the result of a conspiracy against him in violation of 42 U.S.C. § 1985

(3) ("Section 1985(3)"). (R. at 000001-000008). Respondents Local 455 and Wooster filed their answer on 6 December 1994, denying Comeaux's claims, and contending that Comeaux's Complaint failed to state a claim upon which relief could be granted. (R. at 000013-000017). Respondent International filed its answer on 1 March 1995, also denying all of Comeaux's claims, and alleging that Comeaux failed to state a claim upon which relief could be granted; that Comeaux failed to exhaust his internal and administrative remedies, and that Comeaux was not an employee of the International during any relevant period. (R. at 000022-000026).

Local 455 and Wooster filed their Motion for Partial Summary Judgment as to Comeaux's allegations under the ADA and the LMRDA on 2 January 1997. (R. at 000120). Local 455 and Wooster also filed a Motion for Partial Dismissal as to Comeaux's Section 1985 claims under FED. R. CIV. P. 12(b)(6) on 10 January 1997. The International filed its Motion for Summary Judgment on 17 January 1997. (R. at 000193). Upon stipulation of all parties, the district court entered a judgment of dismissal as to the ADA claim against the International on 24 January 1997 (R. at 000245). On 30 September 1997, the district court granted Summary Judgment as to Comeaux's ADA and LMRDA claims, and dismissed Comeaux's Section 1985 claims. (App. at 8).[3] Comeaux filed a Motion for New Trial on 24 October 1997 (R. at 000582). Comeaux's Motion for New Trial was denied on 25 November 1997 (R. at 000602). Comeaux filed his Notice of Appeal on 29 December 1997. (App. at 27; R. at 000604). On 2 October 1998, a panel composed of Circuit Judges Garwood, Jolly and Barksdale

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[3] Citations to "(App. at ——)" refer to the pages of the Appendix submitted with Comeaux's Petition.

issued a *per curiam* opinion affirming the district's court's summary judgment. (App. at 136). On 29 October 1998, Comeaux's Motion for Rehearing was denied *per curiam.* (App. at 138).

SUMMARY OF THE ARGUMENT

Comeaux's LMRDA claims fail because he has no evidence that his termination impaired his rights as a union member (as distinct from depriving him of union employment). More specifically, Comeaux has not shown that his removal impaired his rights as a member to vote, seek office, or otherwise express his views, after the termination of his union employment. This Court's opinions in *Finnegan v. Leu* and *Sheet Metal Workers Int'l. Assn. v. Lynn*, are in fact dispositive of Comeaux's LMRDA claims.

Further, Comeaux's efforts to evade the effects of *Finnegan* and *Lynn*, by showing a ". . . purposeful and deliberate attempt to . . . suppress dissent within the union" are unavailing. In the first place, Comeaux presented no real evidence of such an effort. Moreover, events subsequent to Comeaux's termination indicate that the alleged effort by Respondents to suppress dissent existed primarily in Comeaux's imagination. In any case, the evidence that Comeaux belatedly points to is insufficient to create a fact issue as to the existence of any such effort to suppress dissent.

REASONS FOR DENYING THE WRIT

Comeaux alleges that his lay-off by Wooster violated the "Union Members' Bill of Rights," 29 U.S.C. § 411-415, because it was part of a deliberate effort to suppress dissent within Local 455, despite the facts that the lay-off left Comeaux's membership in Local 455 unaffected; that

Comeaux campaigned in a three-way race for union office; and, that Comeaux freely spoke out on issues of importance to him. (Comeaux's Petition at 1-2; R. at 000416-000417, 000505, 000508).

A. *Finnegan v. Leu* and *Sheet Metal Workers v. Lynn* Are Dispositive of Comeaux's Claims.

Comeaux's LMRDA claim fails because, as the district court recognized, he has no evidence that his removal impaired his rights as a union member to vote, seek office or otherwise express his views, after the termination of his employment. (App. at 20-21).

Comeaux's effort to minimize the significance of *Finnegan v. Leu*, 456 U.S. 431, 102 S.Ct. 1867 (1982) are understandable, because *Finnegan* is in fact dispositive as to Comeaux's claims. (See Comeaux's Petition at 4). Congress's primary objective in enacting the LMRDA's "Bill of Rights of Members of Labor Organizations" was to ensure that:

> . . . unions would be democratically governed and responsive to the will of their memberships. Rank and file union members are granted rights under the Act to protect them from abuse of power by the union leadership. Union leaders, *per se*, are not themselves a protected class under this Act, except that they, too, may not be deprived of the basic rights attending on union membership.

Adams-Lundy v. Association of Prof'l. Flight Attendants, 731 F.2d 1154, 1156 (5th Cir. 1994) (emphasis in the original, quotation marks omitted) (citing *Finnegan*, 456 U.S. at 436-37, 102 S.Ct at 1870-71). The "Union Members Bill of Rights" was thus intended by Congress to protect ". . . rank and file union members—not union officers or employees as such." *Finnegan*, 456 U.S. at 438, 102 S.Ct. at 1871. "Discharge from union employ-

ment does not impinge upon the incidents of union membership, and affects union members only to the extent that they happen also to be union employees." *Id.*[4] Further, the Union Bill of Rights does not ". . . restrict the freedom of an elected union leader to choose staff whose views are compatible with his own." *Id.*, 456 U.S. at 441, 102 S.Ct. at 1973. *See also Rutledge v. Aluminum, Brick & Clay Workers Int'l. Union,* 737 F.2d 965 (11th Cir. 1984) (holding that LMRDA did not prohibit discharge for political reasons of union policy makers, and that *Finnegan* is applicable to union officials who formulate policies as well as those who implement them.); *Cehaich v. International Union, UAW*, 710 F.2d 234, 239 (6th Cir. 1983) (holding that union leaders have right to choose staff with ideas compatible to their own).[5]

Comeaux was laid off from his position as a Local 455 employee because of Local 455's weakened financial posi-

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[4] Comeaux contends that ". . . at least one District Court in the Fifth Circuit has held that where an employee wears two hats, that of rank-and-file member and appointed official, he is protected in his Article I rights." (Comeaux's Petition at 6, *citing Kirk v. Transportation Workers Union of America,* 934 F. Supp. 775-787-88 (S.D. Tex. 1995)). All that the cited portion of *Kirk* says is that the defendants, in addition to being union officers, were also union members entitled to protection of the Union Bill of Rights. *Kirk,* 934 F. Supp. at 787-88. The Respondents have never alleged that Comeaux does not have rights protected by the Union Bill of Rights —they simply contend that dismissing Comeaux from an appointed position, did not infringe on these rights.

[5] Comeaux mischaracterizes the holding in *Finnegan* when he argues that ". . . *Finnegan,* as well as all of its progeny . . . recogniz[e] that . . . a *new* President has the right to terminate the employment of appointed employees of the local union in order to choose a staff whose views are compatible with his own," (Comeaux's Petition at 1) (emphasis supplied, internal quotation omitted). This is a misreading of *Finnegan*—*Finnegan* does not specify a time period in which an union president, may, or may not, hire or appoint persons to positions within the union. *See Finnegan,* 456 U.S. at 441, 102 S.Ct. at 1867.

tion. (R. at 000148-000151). However, Comeaux was still a member of the Local—in fact, Comeaux, after his departure from Local 455 employment, began organizing political opposition to the incumbent, administration of Local 455. (R. at 000151-000155).[6] Comeaux himself states that he was ". . . actively in opposition to the Local leadership's action as a *member* of Local 455." (Comeaux's Petition at 2) (emphasis in the original). Given that, under *Finnegan*, Comeaux's lay-off would be perfectly permissible. Therefore, his LMRDA claim must fail. *Id.*, 456 U.S. at 441, 102 S.Ct. at 1873.[7]

Sheet Metal Workers Int'l. Assn. v. Lynn, 488 U.S. 347, 109 S.Ct. 639 (1989)—cited in the Petition as limiting *Finnegan*—is no help to Comeaux. In *Lynn*, the Court upheld a lower court finding that termination of an *elected* business agent violated the terms of the LMRDA. *Id.* 488 U.S. at 349, 359, 109 S.Ct. at 642, 647. However, the Court's opinion, (notwithstanding Justice White's concurrence, cited by Comeaux), clearly turned on the elected character of the plaintiff. *See id.*, 488 U.S. at 351, 355, 109 S.Ct. at 643, 644. Contrasting the *Lynn* case with *Finnegan*, the Court stated:

> The consequences of the removal of an *elected* official are much different. To begin with, when an

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[6] Comeaux engages in a substantial amount of double speak. On the one hand, Comeaux claims that Respondents admitted that he was ". . . not unloyal to Defendant Wooster, and was not insubordinate." (Comeaux's Petition at 2). Then Comeaux contends that he was ". . . actively in opposition to the Local leadership's action" and seeking the presidency of the Local against "Defendant Wooster's hand-picked successor," presumably while remaining "not unloyal." (Comeaux's Petition at 2, 3).

[7] "As a practical matter, the Union president should be able to work with those who will cooperate with his program and carry out his objectives." *Wambles v. International Bhd. of Teamsters*, 488 F.2d 888, 889 (5th Cir. 1974).

> elected official like Lynn is removed from his post, the union members are denied the representative of their choice. . . . Furthermore, the potential chilling effect on Title I free speech is more pronounced when elected officials are discharged. Not only is the fired official likely to be chilled in the exercise of his own free speech rights, but so are the members who voted for him.
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> *Lynn.*, 488 U.S. at 355, 109 S.Ct. at 644-45. (emphasis supplied).

Unlike the plaintiff in *Lynn,* Comeaux was *not* an elected union official—but a representative appointed and working at the pleasure of the Local 455 president. (R. at 000364). Comeaux's Petition is disingenuous, as well as confusing, when it asserts that "Rather than the distinction between an elected and an appointed official, the only real distinction between Plaintiff's [Comeaux's] and Lynn's [situation] was that Lynn had been elected rather than appointed to the same position Plaintiff held. . ." (Comeaux's Petition at 4). The "only real distinction," minimized by Comeaux, is *precisely the point* upon which *Lynn* turned. *See Lynn*, 488 U.S. at 355, 109 S.Ct. at 644-45. Comeaux, by contrast, was not elected by the members to anything.

Comeaux contends the facts of *Thompson v. Office & Prof'l. Employees International Union*, 74 F.3d 1492 (6th Cir. 1995), *cert. denied sub nom.* 519 U.S. 993, 117 S.Ct. 482 (1996)—are "strikingly similar" to his case. (Comeaux Petition at 5-6). This is clearly erroneous. The plaintiff in *Tnompson*, Phillip Pope, was not only terminated from his position as a business representative—but also involuntarily removed from union membership. *Thompson*, 74 F.3d at 1497-99. Further, the international union ". . . maintained a trusteeship [over Pope's local] for the purpose of interfering with . . . [Pope's] . . .

free speech rights." *Id.* at 1500 (emphasis omittted). The Sixth Circuit Court of Appeals found that Pope was ". . . entitled to protection under the LMRDA *because he was* disciplined [by expulsion from union membership] *in a manner which affected his right to fully enjoy the rights and privileges of union membership.*" *Id.* at 1503 (emphasis supplied). In the matter at bar, Comeaux's union membership was *not* terminated—Comeaux exercised his right to vigorously participate in union affairs and even ran for union office, campaigning against the incumbent administration. (App. at 42; R. at 000304-000305, 000381, 000505, 000508).[8]

Clearly, under the *Finnegan* and *Lynn* analysis, Comeaux's lay-off may not be attacked via the "Union Bill of Rights."

B. The Record Is Devoid of Evidence Suggesting That an Effort To Suppress Dissent Took Place, and Events Subsequent to Comeaux's Termination Show There Was No Such Effort.

Comeaux further attempts to evade the effects of *Finnegan* and *Lynn* by claiming that he presented evidence below of a ". . . purposeful and deliberate attempt to . . . suppress dissent within the union." (Comeaux's Petition at 1-2, *citing Finnegan,* 456 U.S. at 441, 102 S.Ct. at 1873).

In the first place, precisely what would constitute a "deliberate effort to suppress dissent" remains undefined. "It seems clear that claims of infringement are judged

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[8] Comeaux appears to cite the *Thompson* case as evidence of a "conflict between the circuits." (Comeaux's Petition at 5-6). Respondents do not see a conflict between the *Thompson* case—or the other cases allegedly showing a "conflict"—and the decision of the district court and the Fifth Ciircuit, in this matter. The cases cited by Comeaux simply present different sets of facts.

by reference to the LMRDA's basic objective: to ensure that unions are democratically governed and responsive to the will of the union membership." *Harvey v. Hollenback*, 113 F.3d 639, 643 (6th Cir. 1997) (*quoting Lynn*, 488 U.S. at 354, 109 S.Ct. at 644). That objective was certainly met at Local 455.

Comeaux can repeat the mantra "purposeful and deliberate attempt to suppress dissent" as much as he likes, but the record is devoid of evidence suggesting that he was laid-off as part of any effort to suppress dissent. In fact, events after Comeaux's termination make this accusation of Petitioner's ludicrous. Comeaux, after his termination, attended union meetings; ran for union president; campaigned; and, continued to speak out on union issues that were important to him, without suppression. (R. at 000416-000417, 000505, 000508). The most powerful evidence that the alleged "effort to suppress dissent" existed only in Comeaux's imagination is Local 455's election results from November-December 1993. In that campaign, the other "anti-establishment" candidate for the presidency of Local 455, William H. Hopkins, in a three-way race which included Comeaux, defeated the incumbent administration that Comeaux accused of attempting to suppress dissent. (R. at 000304-000305, 000381, 000505-000508).

Comeaux cites *Schermerhorn v. Local 100, Transport Workers Union of America*, 91 F.3d 316 (2nd Cir. 1996), as a case similar to his ". . . where union officers are silenced in a scheme to suppress dissent . . ." (Comeaux Petition at 6-7). To begin with, the "silenced" officers in *Schermerhorn* were *elected* union officials, not appointed employees, such as Comeaux. *Schermerhorn*, 91 F.3d at 319. Moreover, the *Schermerhorn* plaintiffs were denied entrance to union meetings, restricted in their ability to circulate campaign materials, tried on trumped-

up charges for disrupting union meetings, and harassed repeatedly by additional charges of disrupting meetings and bringing personal attacks upon rival union leaders. *Id.* at 320-21. Comeaux, by contrast, was merely deprived of his union employment—but remained free to (and did) organize political opposition to the incumbent administration of Local 455. (R. at 000151-000155). Thus, Comeaux's case is nothing like *Schermerhorn.*

Finally, Comeaux contends that *Nixon v. United Food & Commercial Workers, Local 7*, 751 F. Supp. 1495 (D. Colo. 1990) is analogous to his situation. In *Nixon*, the district court found that the plaintiff, Nixon, raised a question of fact sufficient to survive summary judgment on the issue of whether her dismissal from her position as an appointed union business agent was part of a purposeful and deliberate attempt to suppress dissent within the union. *Nixon*, 751 F. Supp. at 1494-95. *Nixon* involved a particularly unusual set of facts including physical intimidation of an incumbent's opponents, and outright extortion. *Id.* at 1495. Moreover, in contrast to Comeaux, Nixon presented the district court with some arguable evidence to support her claims.

Specifically, Nixon presented affidavits from two opponents of the incumbent president's reelection effort, stating that the incumbent president had refused to provide severance pay to them unless they retired from union employment and signed written agreements that they would never again become involved in union affairs. *Id.* at 1495. Nixon also provided additional affidavits ". . . recounting acts and threats of retaliatory discharge, acts and threats of physical force and censorship of remarks by Mercer supporters during Union events." *Id.* The district court concluded that a jury could find "clear and convincing evidence" of a policy of "controlling disagreement." *Nixon* definitely involved a particularly egregious

set of facts, perhaps explaining why it is a stand-alone case—not followed or cited by any other court construing *Finnegan* or *Lynn*.

By contrast to the *Nixon* plaintiff, Comeaux's proffered evidence of a purposeful and deliberate effort to suppress dissent consists of unspecified excerpts from his own deposition, and the affidavit of Clara Jean Bane, a former Local 455 employee. (Comeaux's Petition at 2; App. at 44). Ms. Bane contends that her lay-off status was changed from temporary to permanent in December of 1992, after she expressed support for Comeaux's campaign for president of Local 455 to a co-worker. (App. at 48-49). Ms. Bane says that the co-worker had a "direct reporting relationship" to Respondent Wooster and she surmises that her remarks were reported to Wooster—and that this lead to the change in her lay off status. (App. at 49). By her own admission, then, Ms. Bane does not know that her remarks led to the change in her status—she merely conjectures that it did. In any event Ms. Bane was re-hired by Local 455 in January of 1994. (App. at 46). Significantly, there is no evidence that Ms. Bane's membership status or her ability to engage in union political affairs was in any way suppressed.

Both Bane's situation—and the degree of her knowledge of adverse action which may have been taken against her—are substantially different from the situation in *Nixon*—where the offending union president personally told employees that he would not provide severance packages for them, unless they retired; as well as personally extorting from them signed pledges to stay out of union politics. *Id.* at 1495. Neither Bane's affidavit, nor some unspecified deposition excerpts by Comeaux—could lead a reasonable jury to conclude "clear and convincing evidence" (the standard used by the *Nixon* court) existed of

a plan by Respondents to suppress dissent within Local 455.

CONCLUSION

For all of the foregoing reasons, the grant of summary judgment by the district court, and its affirmance by the Fifth Circuit, should be upheld. Comeaux's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

PATRICK M. FLYNN
1235 North Loop West
Suite 1235
Houston, Texas 77008
(713) 861-6163
Counsel of Record for Respondents United Food and Commercial Workers Local Union No. 455 and Ray B. Wooster

ERIC H. NELSON
3303 Main Street
Suite 300
Houston, Texas 77002
(713) 526-1998
Counsel of Record for Respondent United Food and Commercial Workers International Union, AFL-CIO, CLC

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